

1 UNITED STATES OF AMERICA
2 UNITED STATES DISTRICT COURT
3 CENTRAL DISTRICT OF CALIFORNIA
4 WESTERN DIVISION

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6 HONORABLE CONSUELO B. MARSHALL,
7 UNITED STATES DISTRICT JUDGE PRESIDING
8 - - -

9 GLOBEFILL INCORPORATED, a)
10 Canadian corporation)
11) CERTIFIED COPY
12 PLAINTIFF,)
13) CV 10-2034 CBM
14 VS.)
15)
16 ELEMENTS SPIRITS, INC., a)
17 California corporation, and)
18 KIM BRANDI, an individual,)
19)
20 DEFENDANTS.)
21 -----)

22 TRIAL DAY TWO
23 REPORTER'S TRANSCRIPT OF PROCEEDINGS
24 WEDNESDAY, MARCH 15, 2017
25 A.M. SESSION
LOS ANGELES, CALIFORNIA

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1 LOS ANGELES, CALIFORNIA; WEDNESDAY, MARCH 15, 2017

2 A.M. SESSION

3 - - -

4

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6 THE CLERK: CV 10-2034-CBM: Globefill
7 Incorporated versus Elements Spirits, Incorporated, et
8 al.

9 Counsel, state your appearances.

10 MR. BERG: Individual names of our lawyers
11 again?

12 We are here for the plaintiff and ready,
13 Your Honor.

14 THE COURT: It is a matter of what you want
15 on the record. So if you want the court reporter's
16 transcript to show your names, of course, then you have
17 to state the names. If you don't think that is
18 important, then you don't have to do that.

19 MR. BERG: We do want the names, Your Honor.
20 We have Jenny Kim, Mike Fay, Zenobia Bivens,
21 David Berg and, of course, Hernan Vera.

22 THE COURT: Thank you. Good morning.

23 MR. HUMMEL: Good morning, Your Honor.

24 Keith Hummel for Elements Spirits. With me
25 is my partner Tom Rafferty and my colleague Rebecca

1 Rettig.

2 THE COURT: Good morning.

3 MR. MILLER: Good morning, Your Honor.

4 John Miller for Kim Brandi.

5 THE COURT: Good morning.

6 The matter before me now is the matter we
7 left from last night. So I said I would rule on it this
8 morning, and I will do so.

9 I think most of our jurors are here. So if
10 all are here after we complete the Court's either
11 questioning or ruling on the matter that's outstanding,
12 I will just stay on the bench and the clerk will just
13 bring the jury into the box.

14 So it may be that we will not have another
15 break between now and when we actually start
16 presentation in the presence of the jury.

17 So the outstanding matter that's left over
18 is the plaintiffs' ex parte application for
19 reconsideration of the Court's order denying the motion
20 to amend the joint exhibit list to add Brandi's 2016
21 trademark application.

22 It is a motion for reconsideration. It
23 doesn't pass the rule re motions for reconsideration. I
24 don't think there is anything new.

25 The Court listened to argument last night.

1 And so it may be that the arguments could -- may have
2 focused a little bit on things that weren't in the
3 papers. But basically, there is nothing new in this
4 motion.

5 The Court also considers the manifest in
6 justice. And the Court finds that that is not such and
7 does the balancing, as I said in the previous order that
8 I issued, to permit this amendment of the exhibit list.

9 Having said that, counsel also identified
10 that one of the purposes for adding this exhibit to the
11 list is for -- to assist the Court in deciding questions
12 that are reserved for the Court and not for the jury.
13 So I'm referring to the disgorgement of profits and or
14 attorney fees, the amount of profits and whether
15 attorney fees may be deducted for any profits.

16 Those are not jury questions. Those are
17 Court questions. And so counsel may, when we get to
18 those issues, outside the presence of the jury, ask the
19 Court again for this permission. So I am inclined to
20 consider this exhibit for those purposes.

21 So it will not be -- this exhibit will not
22 be presented to the jury. It won't be added to the
23 witness -- to the exhibit list for purposes of an
24 exhibit that goes to the jury. But the Court may
25 consider it for purposes that are not before the jury.

1 So that's the Court's ruling on that motion
2 that was left outstanding.

3 I want to raise with you just a couple of
4 things that I'm uncertain about. One is, there are
5 additional filings I think that were probably filed late
6 yesterday. The first document is the deposition
7 designation for a Gilberto Sanchez Escarcega.

8 So what I don't know, I'm not clear on, is
9 this a witness whose deposition will be used in lieu of
10 the witness being here at trial? If that is the case,
11 then obviously the Court needs to read the parts that
12 have been designated, the objections to those parts, and
13 advise the parties of the Court's ruling before this
14 deposition is read.

15 So the first question is: Deposition in
16 lieu of live witness testimony from this witness. And
17 then the second question would be, if that first is
18 answered, yes, when would you expect to read?

19 So whoever is offering this can speak first.

20 MR. HUMMEL: So Keith Hummel for Elements.

21 Mr. Sanchez Escarcega is only on our witness
22 list. It is not on plaintiffs' original witness list.

23 THE COURT: And live witness or deposition
24 in lieu thereof?

25 MR. HUMMEL: It is going to be a deposition

1 in lieu thereof.

2 THE COURT: So you have already designated
3 the portions of the deposition by just following the
4 local rule, marking those in some way for the Court to
5 read, correct?

6 MR. HUMMEL: That's correct, Your Honor.

7 I believe what we submitted to you was the
8 entire set of designations from both parties.

9 I understand that Your Honor prefers to have
10 testimony from one witness at one time, rather than
11 breaking it up into two sections.

12 THE COURT: I see what you mean. So if both
13 sides were to call that witness as their witness, yes,
14 my preference would be to have all of the witness'
15 testimony rather than one party call the witness and
16 then the other side call the witness again in another
17 day or two. That is my preference.

18 So I should understand that his testimony
19 will be presented by deposition. And the objections
20 that have been filed are objections to the portions of
21 the deposition that had been designated?

22 MR. HUMMEL: That's correct, Your Honor.
23 And our position is that since this is our witness, he
24 should be -- his testimony should be played in our case.

25 THE COURT: Okay. So that was my next

1 question. When would you expect this witness would be
2 called so that I will read the designated portions, be
3 prepared to rule on the objections, all before you are
4 ready to read the deposition so that you will know what
5 to read?

6 MR. HUMMEL: Luckily we have this on video
7 tape. So there's a transcript. But there's also the
8 videotape to play to the jury.

9 THE COURT: Same thing, the question is
10 when?

11 MR. HUMMEL: To answer your question of
12 when, Your Honor, I don't have the full extent of when
13 the plaintiffs are going to be done with their case. In
14 fact, I don't have an official designation even of the
15 witnesses who are being called tomorrow.

16 But I would expect that if we are sitting
17 tomorrow, and Mr. Berg takes up next Tuesday, you know,
18 the earliest that we would get to Mr. Escarcega would
19 probably be on Friday of next week.

20 THE COURT: Of next week?

21 MR. HUMMEL: So you have time, Your Honor.

22 THE COURT: Right. So we will, every day at
23 the end of the day, go over the witnesses to be called
24 for the next day, the exhibits to be used, just as we
25 did last night.

1 But I looked at those emails that were
2 addressed last night, and it appeared to me what the
3 parties were agreeing to, is you would have 24 hours'
4 notice.

5 If that is the understanding of both sides,
6 regardless of who may be presenting evidence, then that
7 is something that you need to do. The opposing side
8 within 24 hours or whatever period of time that it might
9 be, should know the identity of witness, the exhibits to
10 be used. And then when the Court asks that, we don't
11 have to spend half the night here, because you will just
12 simply tell me, the other side has it already, and these
13 are the names and these are the exhibits. So that's
14 what I expect will happen.

15 I am concerned, if it's true, that the
16 plaintiffs who may be calling witnesses tomorrow, one or
17 two, that the defendants don't know who that second
18 witness will be.

19 MR. HUMMEL: And the exhibits, Your Honor.

20 THE COURT: And the exhibits to be used as
21 well.

22 And then because I am not here on Friday,
23 tomorrow -- or tonight probably -- probably this evening
24 I will be looking at who are the witnesses to be called
25 on Tuesday, the exhibits to be used with those witnesses

1 and so forth. Because we won't have time to do this
2 before Tuesday.

3 Tomorrow we will have a short session to
4 accommodate at least one witness, possibly two. But I
5 will not have time to stay and go through the exercise
6 of who are the witnesses and the exhibits to be used.
7 So I will expect that you will have already done that
8 for Tuesday's witnesses. So I raise that question and
9 expect that you tell me that's been covered.

10 So anything further for defense counsel on
11 either the issue I raised or just your concern about, do
12 you know which exhibit is going to be used with which
13 witness tomorrow?

14 MR. HUMMEL: I am very concerned that I
15 don't know which exhibits are going to be used tomorrow.

16 THE COURT: Let me hear from plaintiffs'
17 counsel.

18 First, do you wish to address the document
19 that I referenced, and that is, the deposition
20 designations for the witness whose deposition will be
21 presented to the jury?

22 MS. BIVENS: Yes, Your Honor. Plaintiffs
23 are happy to withdraw our designations if the
24 designations that were filed by Elements are the
25 designations that we made. And we can work that out

1 with the Elements' counsel if it's okay with the Court.

2 THE COURT: So does that suggest -- and
3 something to talk about -- maybe there are no objections
4 to the designated part, so there is nothing for the
5 Court to read in advance. So maybe you can have that
6 conversation and just let me know. Obviously, I don't
7 need to read it if I don't need to read it.

8 MS. BIVENS: Yes.

9 THE COURT: And then for exhibits that will
10 be used with either one or two witnesses who will be
11 called tomorrow, you may make a statement for the record
12 concerning that.

13 MS. BIVENS: Yes, Your Honor. We sent them
14 about 20 minutes ago, the demonstrative that will be
15 used for Christina Cappellini, as well as the exhibits.
16 And also we sent the exhibits that will be used for
17 David Brown.

18 THE COURT: About 20 minutes ago?

19 MS. BIVENS: Yes.

20 THE COURT: So we want to do better than
21 that. And I need counsel to tell me, if your
22 understanding is 24-hours' notice to the other side,
23 name of witness and exhibits to be used, then that's
24 what you need to honor.

25 MS. BIVENS: Okay.

1 THE COURT: So when I ask, you'll be able to
2 tell me "We've done that already." And I shouldn't hear
3 anything to the contrary for the other side. If your
4 agreement is not 24 hours, then it is whatever you have
5 agreed to.

6 But as I said, when I ask today that
7 question after the jury leaves, it looks like everybody
8 will be prepared to respond to me. But the 24-hours'
9 notice is generally what I see in the civil cases. So I
10 think 24 hours is good. It seems to me there are enough
11 lawyers here that you can make that happen.

12 But if your understanding is something
13 different, then you can just indicate to the Court.

14 MS. BIVENS: Yes, Your Honor. We received
15 the exhibits from defendants yesterday morning, so we
16 just followed suit. That was 24 hours.

17 THE COURT: Let's don't follow suit. Let's
18 have counsel meet and discuss this.

19 MS. BIVENS: Okay.

20 THE COURT: Whoever is responsible for doing
21 this, let those two people meet, one from each side,
22 come to some understanding as to when things are going
23 to be disclosed and honor that.

24 Then we don't need to have a lot of
25 discussion about it. It works for both of you because

1 obviously you want to know in advance so you can
2 prepare.

3 MS. BIVENS: Yes, Your Honor. Thank you for
4 clarifying.

5 THE COURT: And then there is one more
6 filing, I believe. No. They seem to relate to the same
7 thing. So one is the deposition designations, and the
8 other one is the index of plaintiffs' deposition
9 designation and defendants' counter designations and
10 objections thereto.

11 So at this point, it looks like there are
12 objections. So I would order counsel to meet and confer
13 and see if you can't resolve that.

14 What parts of the deposition does each side
15 designate to be read? And if -- and whether there are
16 any objections thereto.

17 If there are no objections, then the Court
18 doesn't need to be involved in it. If there are, then I
19 need to rule.

20 MS. BIVENS: Yes, Your Honor. We will work
21 with the other side to clarify the designation
22 objections.

23 THE COURT: Okay. I'll just ask the clerk,
24 are all of our jurors here?

25 THE CLERK: No. We are missing one.

1 THE COURT: Are there any other matters that
2 you wish to raise with the Court? Apparently we are
3 missing one juror. If not, I'll let you take a break.
4 If so, I will listen.

5 MR. HUMMEL: Your Honor, I don't know --
6 sorry. Keith Hummel for Elements.

7 I don't know when the proper time for Your
8 Honor to consider this issue, but when we received the
9 designation of the order of witnesses from Globefill,
10 they included a witness that was not on their joint --
11 it was actually not on the witness list from the joint
12 exhibit list. It was not a witness who was disclosed in
13 any of their Rule 26 disclosures; essentially a
14 surprise, new witness, Ms. Elise Lichtman.

15 And we would move to have that name stricken
16 and her testimony not permitted given the egregiously
17 late disclosure of her. She has never been deposed.
18 She was not identified as a witness or a person of
19 knowledge of the Globefill claims or defenses in this
20 case.

21 THE COURT: All right. So the proper time
22 to consider it and for the Court to rule on it, is
23 sometime prior to the witness being called. So I will
24 ask plaintiffs first, just when would you plan to call
25 this witness if the Court should allow?

1 MS. BIVENS: Your Honor, we are calling the
2 witness Elise Lichtman as a rebuttal witness.

3 THE COURT: And so then the question would
4 be whether it really constitutes rebuttal. So when the
5 time comes, and the plaintiffs announce that they wish
6 to call the witness as a rebuttal witness, I will
7 require them to make a proffer. If the Court finds it
8 to be rebuttal, and it goes to -- it -- if the Court
9 finds that it in fact is rebuttal, then the Court may
10 allow the witness to be called, and our rules make room
11 for that. So that discussion can be held when we get to
12 that point of rebuttal.

13 But I would require the proffer, and then
14 the Court will rule on whether the witness can be
15 called. So I don't think we need to discuss it any
16 further at this point.

17 MS. BIVENS: Thank you, Your Honor.

18 THE COURT: Are there other matters that
19 either side thinks may come up today? If you have any,
20 I will let you raise them.

21 If not, I was just going to ask, are there
22 any exhibits that will be used today to which there are
23 objections? There might not be any. We discussed this
24 a little bit last night.

25 But if there are no exhibits that you plan

1 to use today to which there are objections, then I would
2 deem all the exhibits admitted.

3 If I haven't already done so, you may
4 publish them. You don't have to go through the exercise
5 of first marking them and then offering them, those
6 steps that we normally would go through. They should
7 already be marked. If no objections, they're deemed
8 admitted, and you may use them in the manner which you
9 wish.

10 Counsel.

11 MR. HUMMEL: Your Honor, I just have a
12 housekeeping issue, I have the bottles which we
13 discussed yesterday in a box over here. And I am
14 wondering where to place them. Or if I would hand them
15 to the jury during openings, how we would handle that
16 mechanically.

17 THE COURT: Well, I think last night we said
18 the actual getting it to the jury would be done by the
19 courtroom deputy. So you would actually give them to
20 her. So you can ask her where does she want them. And
21 you can tell her how you would refer to them so that
22 she'll know when. Or you may even say, We would like to
23 have the jury examine them. And then she will know
24 which one, and she'll give it to the jury. So it's for
25 the convenience of the clerk, just so she'll have it.

1 And you might ask her, Where should it be?

2 MR. HUMMEL: Great. Thank you.

3 MR. BERG: I also have a question about how
4 to get the bottle to the jury. I just have two of the
5 bottles. I want to hold them myself for a while.

6 How do I get them to the deputy so it can be
7 taken to them?

8 THE COURT: You walk around like you did
9 yesterday when we had all those sidebars or -- again,
10 ask the clerk. She will tell you the most effective way
11 to get it to her. You may even say, "I would like to
12 have the jury examine these." When you say that, she'll
13 probably walk up to you, you give them to her and she'll
14 take them over to the jury. Just that simple.

15 MR. BERG: Thank you.

16 THE COURT: Anything else?

17 MR. HUMMEL: Nothing else.

18 THE COURT: If there is nothing else for the
19 Court if we are still missing one juror, then we can
20 take a short break.

21 MR. BERG: No. Nothing else.

22 MR. HUMMEL: Nothing.

23 THE COURT: Okay. Thank you.

24 THE CLERK: Please rise. This court is in
25 recess.

1 (RECESS TAKEN.)

2 (JURY PRESENT.)

3

4 THE CLERK: CV 10-2034-CBM: Globefill
5 Incorporated versus Elements Spirits, Incorporated, et
6 al.

7 THE COURT: Appearances, please, just for
8 the jury.

9 MR. BERG: Yes. David Berg for Globefill
10 accompanied by our colleagues: Zenobia Bivens, Mike
11 Fay, Jenny Kim; and, of course, John Alexander and Danny
12 Aykroyd.

13 MR. HUMMEL: Keith Hummel for Elements
14 Spirits. With me is Thomas Rafferty and Rebecca Rettig.

15 THE COURT: Good morning. Good morning to
16 the panel. Sorry.

17 MR. MILLER: John Miller for Kim Brandi.

18 THE COURT: Next time I will let you go
19 first for the defense side.

20 Good morning, panel. We are actually
21 starting about an hour late. So we will probably try to
22 make up that hour today. Because what I'm trying to do
23 is to get at least five hours of the jury in the box
24 listening to testimony. Otherwise, it takes us longer
25 to get the case presented to you.

1 Not unusual on the very first day to have a
2 little stumble. I realize that you are not accustomed
3 to coming to this courthouse. So it may take a little
4 bit longer to travel here and there could be traffic
5 issues and personal issues. But I will ask again today
6 before you leave whether the eight o'clock start is
7 actually good for everyone.

8 So it's something that you may be thinking
9 about. If it isn't good, if you've decided, I can't be
10 there to start at eight o'clock, then I would adjust the
11 time so we don't have some jurors here waiting and
12 others jurors trying to get here.

13 But we are ready to start now. You are
14 going to hear the opening statement of counsel. It is
15 often described as an outline or road map. So it is
16 addressing what each side believes the evidence will be
17 in the case, based upon their preparation of the case.

18 Now, of course, the statement they will be
19 making to you is not evidence. Remember, the lawyers
20 are not witnesses to what happened that caused the
21 lawsuit to be filed.

22 So they are not testifying. They are not
23 under oath. They are simply making a statement to the
24 jury.

25 I have placed some time limits on it, so

1 they would like to be able to make a longer statement,
2 but I'm anxious for you to actually hear the evidence
3 that will be given by witnesses who will be testifying
4 and exhibits that may be received.

5 You will hear an opening statement from each
6 side. And then after that, the Court will give some
7 preliminary instructions to the jury. And the first
8 witness will be called.

9 So our break will be proximately two hours
10 from now. If anyone needs a break sooner, it is just a
11 matter of raising your hand or indicating to me in some
12 way that you need me to consider why your hand may be
13 raised. And then we can take an earlier break if we
14 have to. But trying to manage the trial in a way that
15 you will be sitting for approximately two hours, then
16 we'll have a short break and then you'll come back and
17 sit for an additional two hours with maybe another
18 break, depending on what time that happens to be.

19 So at this point, we are going to commence
20 and plaintiffs' counsel may make the opening statement.

21 MR. BERG: Thank you, Your Honor.

22 Good morning, everyone.

23 Good morning, counsel.

24 Are we passing out some things to the
25 jurors? I'll just wait.

1 THE COURT: They are note tablets. But what
2 I would suggest is you don't need to take notes on these
3 opening statements because as I said this isn't
4 evidence. So you might just want to listen. But you
5 are permitted to take notes, and I give you an
6 instruction concerning that later.

7 MR. BERG: Your Honor, may I ask the Court
8 deputy to give me a five-minute warning at 15 minutes?
9 Would that be appropriate?

10 THE COURT: When you have five minutes left?

11 MR. BERG: Yes, ma'am. At 15. I think we
12 said 20?

13 THE COURT: Yes.

14 MR. BERG: Yes, ma'am.

15 THE COURT: I have a little digital clock
16 and so I will tell you, you have five minutes left.

17 MR. BERG: Thank you.

18 Ladies and gentlemen, this is the Crystal
19 Head Vodka bottle. It was the first bottle in the
20 history of this country, first skull-shaped bottle ever
21 to contain alcoholic beverages to be sold in the
22 marketplace.

23 Never happened before. We know it never
24 happened before because this man and this man, my
25 clients, John Alexander, Danny Aykroyd, made sure we

1 were not infringing on someone else's bottle selling
2 alcohol.

3 I want you to remember that it came to
4 market it September of 2008. September of 2008.

5 Now, I'm going to tell you how this bottle
6 came to be. It came to be from these two friends right
7 here. They've known each other, at that point, in
8 either late 2005 or early 2006, they can't remember
9 exactly, on a snowy evening. And the two of them were
10 talking.

11 And Danny was talking about a new business
12 he was in. Danny, the actor, is also a businessman, as
13 you will find out. Danny had gone into the wine and
14 spirits business, and he will talk to you about that in
15 length when he testifies later on in the trial.

16 But Johnny had an idea. Johnny is a
17 wonderful artist. I'm going to brag on him a bit. His
18 works are carried in -- have been acquired by the Museum
19 of Modern Art, the Los Angeles County Museum and the
20 Smithsonian, among many.

21 But he also has a side to him that is very,
22 very interesting. He thought for a long time -- and
23 we'll tell you why later. He thought for a long time
24 that a skull would make a great vessel to sell alcoholic
25 beverages in. Johnny wanted to sell tequila. But Dan,

1 for reasons related to a relationship with a friend who
2 was also in the tequila business, said no, he wanted to
3 see pure vodka in the bottle.

4 And that's when they began, late 2005, early
5 2006, doing the really hard work it took to bring this
6 bottle to market.

7 One of the things that cements their
8 friendship is that these guys both come from working
9 class backgrounds, where they learned a great deal about
10 hard work and developed a great work ethic.

11 Danny was a postal carrier. At 14 he worked
12 for the railway as warehouseman. We'll tell you more
13 about that.

14 Johnny worked in the oil fields in south
15 Texas where he's from. Not in his family oil fields, I
16 can tell you that. They were just oil fields, where he
17 did contracting work and built roads of wood so that
18 they could bring the heavy equipment across.

19 These are not guys who came from anything
20 but working class backgrounds who came to a certain
21 point in their life and poured that work ethic into
22 building and making this bottle.

23 Johnny was very particular about what the
24 bottle would look like. He drew sketch after sketch
25 after sketch. He was absolutely determined that it

1 would be original. Because that is what an artist does.
2 An artist does not want to copy someone else. Someone
3 with integrity in their work, as Johnny has, doesn't
4 want to copy someone.

5 Danny went about the business of -- he
6 advised, they conferred about what the bottle should
7 look like -- and we'll go into detail about that. And
8 that took quite some time. Danny shopped around the
9 world for the right bottle maker. The right bottle
10 maker was in Italy, Bruni, which used crystal that comes
11 from Slovenia.

12 MR. AYKROYD: Slovenia.

13 MR. BERG: The answer to that question is
14 Slovenia.

15 And -- that's the one the joys of
16 representing Danny and John.

17 In any event, this was the product. It came
18 to market in 2008 in September. These guys hoped to
19 sell 5,000 cases the first year. There was so much
20 press, and it was Danny's celebrity, they sold
21 5,000 cases within the first few weeks. It was huge,
22 game-changing hit, spectacular, lots of press.

23 Two years later, two years later in November
24 or December of 2010, this bottle came out KAH Tequila.
25 There are three different bottles, but I am going to

1 show this one for right now. I am going to ask the
2 courtroom deputy to pass them around so you can see
3 them.

4 So how is it that never before had there
5 been a skull-shaped bottle selling alcoholic beverages,
6 and along comes another one that is skull shaped, that
7 has sculpted features, defined features, a tilted
8 spout -- and that's a story in and of itself. It's a
9 very expensive decision put a titled spout on a bottle.
10 And we don't know other bottles with titled spouts. It
11 would be ever so much easier to make a bottle that the
12 liquor poured in this way straight down. That's how the
13 machinery works. Odd coincidence.

14 So what happened between 2008 and 2010? We
15 believe that Ms. Brandi, Kim Brandi or Kimmy Brandi, as
16 I heard her called, had the opportunity and motive to
17 copy our bottle and bring the bottle to market that
18 was -- that infringed on our trade dress, as the Judge
19 called it yesterday, the skull-shaped bottle.

20 Let me show you what I mean. There is a
21 magazine called Beverage Industry News. This is the
22 issue, if you look at your screens, that came out in
23 February-March of 2009. Now, our bottle had been on the
24 market for six months. This was an insert in that
25 magazine. It was a feature story about new products.

1 Kim Brandi was the editor and chief of this magazine.
2 Kim Brandi was able to see our bottle. I don't know if
3 she'll deny seeing it. I think we can show you by
4 what's called the preponderance of the evidence that she
5 had to have seen it.

6 And so it was that that was the first step.
7 And remember there was huge press within the beverage
8 industry, because it was Danny. And Danny was out going
9 from city to city often with Johnny. I think they went
10 to 35 states. Danny went to 35 states and countless
11 cities that we will talk about within the first year and
12 a half. This was not easy. This has hard work to try
13 to make this a success.

14 Now, let me tell you about what Ms. Brandi's
15 motive was. She founded a company called Elements.
16 Elements owns KAH Tequila. There are three more
17 bottles -- there are other bottles, too, in different
18 colors, but I just wanted you to see the example -- and
19 I'm going to -- I was going to ask the courtroom deputy
20 to circulate these to the jury, but she seems to have
21 disappeared.

22 THE COURT: Well, I will ask someone on my
23 staff to just pick up the bottles that you wish the jury
24 to examine.

25 MR. BERG: Yes, ma'am.

1 THE COURT: So at this point, to aid counsel
2 in his opening statement, he would like for the jurors
3 to see the bottles that he is addressing. Those will be
4 passed among you. We'll start with the first juror to
5 be seated.

6 You can make the examination of the bottle
7 and then just pass it on to the next juror.

8 MR. BERG: What we will tell you is, that
9 they just painted our bottle. There are differences.
10 If you are going to do a knockoff of someone else's
11 product, you don't make it exactly the same. So there
12 are some differences. And we agree with those -- that
13 there are differences.

14 But what you have to understand about the
15 bottle that Juror No. 3 just passed, the KAH Tequila
16 bottle, is it is a cheap knockoff made, you will not be
17 surprised to learn, in China.

18 Danny went all over the world to find
19 really, I think, probably the best glass company
20 conceivable for this bottle, Bruni in Italy.

21 And that bottle was made in China.

22 Now, let me tell you about something that
23 happened. Let me bring you forward in time. So our
24 bottle has been on the market since 2008. It's going
25 great guns. Nobody had seen anything like these sales,

1 even more than some of the really big, skyrocketing
2 vodkas.

3 Here is what happened. There is something
4 called the Las Vegas Restaurant and Bar Trade Show.
5 It's one of the biggest in the industry every year. All
6 the vendors, all the consumers, the people who buy and
7 sell alcohol come there to see what's new on the market,
8 what's old on the market.

9 Well, Kim Brandi decided that she was going
10 to -- not release her bottle. Her bottle didn't come
11 out until fall, until November-December, 2010.

12 But she decided she was going to show the
13 world, the liquor world her bottle. And so she created
14 a magazine. She had been in the publishing end of the
15 business. I told you she was editor and chief of
16 Beverage Industry News. She created her own magazine
17 called Liquid Living.

18 There will be evidence, ladies and
19 gentlemen, we intend to prove, that she called a woman
20 by the name of Lucillia Crowe at a company called
21 Infinium. Infinium is Globefill's importer. Globefill
22 is made in Canada, in Newfoundland. You have to have an
23 importer. They have hundred of brands in Newfoundland.

24 There is going to be testimony from Ms. Crow
25 that Kim Brandi called her and said, We have a vacancy,

1 a spot in our magazine. An empty spot because another
2 vodka -- I think it's called Ciroc -- dropped out.
3 Would you send an ad for Crystal Head Vodka? I think
4 Ms. Brandi will try to deny that.

5 Let me show you what that was about. This
6 magazine, Ms. Brandi and her then colleague passed out
7 to everybody in this convention that they could find.

8 This is the magazine cover. If you can see,
9 the highlight on the first page -- or the front page is
10 KAH Tequila. The back page has three -- all three of
11 her bottles of KAH Tequila. There is a three-page
12 spread on KAH Tequila in her magazine. She is promoting
13 it. She is coming to market.

14 Then there is another page with three of her
15 bottles. And now we are going to find out where the ad
16 that our that Infinium innocently sent to Liquid Living
17 Magazine came out.

18 This is the centerfold, ladies and
19 gentlemen. Next to Kim Brandi's picture -- she's on the
20 left, and that is her cofounder on the right. Next to
21 her picture is Crystal Head Vodka, an attempt to
22 piggyback on all of our hard work. An attempt to
23 exploit the time, money and energy that these two men
24 and others, like Jonathan Hemi over here, the managing
25 director of the company, others who put in to make this

1 a success. This was an attempt, we think, intentionally
2 to confuse the consumer, the ordinary consumer, the
3 people at that show and other shows that she went to, we
4 think this was an attempt, we think the evidence will
5 clearly show it was an attempt to create confusion about
6 the source of KAH Tequila and Crystal Head Vodka, an
7 attempt to make it appear that KAH Tequila was part of
8 our family of products.

9 That's why we are here in this courtroom, to
10 fight, to defend what was a distinctive,
11 one-of-a-kind -- the bottles have disappeared. One of
12 the lawyers is probably drinking it. You have a
13 distinctive, one-of-a-kind bottle that's just never been
14 done before.

15 It deserves the protection of a Court. It
16 deserves the protection of reasonable men and woman who
17 can look at the evidence and make a significant decision
18 about whether or not Kim Brandi and Elements have
19 infringed on our trade dress, the skull bottle, as Her
20 Honor told you yesterday, about the source, to create
21 confusion about the source of the bottle, because they
22 are confusingly similar.

23 There are differences in the bottle, we
24 readily concede that. One is painted, one isn't
25 painted. Ours isn't painted. They've got three painted

1 bottles.

2 But this is not a case about someone walking
3 into a liquor store wanting to buy KAH Tequila and
4 buying instead a bottle of Crystal Head Vodka, or
5 someone wanting to buy a bottle of Crystal Head Vodka
6 and buying a bottle of tequila. It is not a case about
7 the dissimilarities. I mean, one is painted, one isn't.
8 It's a case about the similarities.

9 That's what the defendants have to explain
10 to you. How was it that two years after we came out
11 with Ms. Brandi's exposure -- she had been in the liquor
12 industry, in publication mostly, for more than two
13 decades when we came out with our bottle. They have to
14 explain to you, how did these similarities occur?

15 You've got the same skull shape, never been
16 done before. You've got that tilted head; about the
17 same size; and these defined features.

18 I heard secretary Clinton say, You're in the
19 campaign when you see a turtle on top of a fence post.
20 It didn't get there by accident.

21 This is not a series of coincidences. The
22 proof in this case -- we intend to prove that the bottle
23 was copied with an intentional -- with the intent to
24 infringe on our trade dress.

25 After the trade show in Las Vegas, Danny and

1 John had their lawyers send what is called a cease and
2 desist letter. It was a letter that you'll see in the
3 evidence when the time comes that told Ms. Brandi -- I
4 mean, by the time the show was over, we knew all about
5 KAH Tequila -- KAH Tequila in Liquid Living Magazine.

6 THE COURT: Counsel has five minutes.

7 MR. BERG: We sent a cease and desist letter
8 to Ms. Brandi courteously asking her not to go to market
9 with her bottle. Now, she obviously knew about our
10 bottle. She put it in her magazine. She had the cease
11 and desist order.

12 Let me tell you one other coincidence. Do
13 you know who the keynote speaker was at that Las Vegas
14 convention? It was Danny. Danny Aykroyd was there to
15 talk about Crystal Head Vodka and talk about the
16 business that he was trying to make a success and was
17 being successful.

18 So all these coincidences tell you that she
19 went into the sale and marketing of her product, which
20 came out later that year, in November of 2010,
21 intentionally, with full knowledge of our bottle, and
22 with the intent to make it appear that KAH Tequila was
23 part of our family of products or vice versa.

24 And now, all over the country, when you go
25 into a liquor store you will see these two bottles side

1 by side. Usually you see tequila over on one side,
2 vodka over on another, scotch here, bourbon there. You
3 see them elsewhere. You see them separated.

4 Now we're going to show you evidence of
5 those bottles sold side by side and the confusion even
6 among the retailers about whether or not KAH and Crystal
7 Head are manufactured by the same company.

8 It is kind of an identity theft. It is not
9 like stealing your credit card. But it is borrowing all
10 the hard work that it took to put this together. All of
11 the time, energy and money.

12 It is a simple matter. It's in King James,
13 Exodus 20: Thou shall not steal. Thou shall not covet
14 thy neighbor's property. It is simple matter of doing
15 what's right and doing what's wrong.

16 In closing, I want to tell you, and I'm
17 really not trying to ingratiate myself to you, what you
18 do is really important. Every lawyer in this courtroom,
19 every person in this courtroom believes in the 7th
20 Amendment right to this jury trial. It has probably
21 never been as important to underscore the importance of
22 your role, probably in the history of our country.

23 You are the sole judges of the facts. Her
24 Honor will instruct you on the law. It will be your
25 decision. It is in your hands as to the facts of this

1 case. We think the evidence will lead you to the
2 conclusion that I suggest to you today, that KAH
3 Tequila, the bottles that you looked at, are a knockoff
4 of our very beautiful bottle, Crystal Head Vodka.

5 Thank you.

6 THE COURT: The defense will now make its
7 opening statement.

8 MR. HUMMEL: I just have to organize my own
9 props.

10 Good morning, ladies and gentlemen of the
11 jury.

12 As I introduced myself before, I am Keith
13 Hummel. I represent Elements Spirits. You met my team.
14 Later today, throughout this trial, they are going to be
15 standing at this podium addressing you and addressing
16 witnesses as we go through this.

17 This is the Crystal Head Vodka. I will
18 start the same way Mr. Berg did. No one is disputing
19 that Crystal Head Vodka has rights on this bottle.

20 But I want to be absolutely clear about
21 something. Elements Spirits and Kim Brandi never copied
22 this bottle. They have never sold a product in this
23 bottle.

24 Crystal Head's position is that anyone --
25 you'll hear this throughout the trial -- that anyone who

1 sells an alcoholic beverage in any bottle that looks
2 like a skull in any way infringes their trade dress.
3 That is a very broad statement.

4 And we know in this country if you have
5 rights to a trade dress, you are entitled to those
6 rights. But you are not entitled to keep other unique
7 products off the market. And that's what this trial is
8 about.

9 Mr. Berg addressed a lot of his parts of the
10 facts. It will come as no surprise to you that we
11 disagree with the conclusions he reaches from the
12 evidence that he chose to show you.

13 But throughout the trial, you are going to
14 hear Ms. Brandi talk about those items. And you will
15 hear the fact that none of those conclusions that
16 Mr. Berg has drawn are based in reality or in fact.

17 But what I want to talk about is the fact
18 that there are two companies here that achieved two
19 different products in two completely different ways with
20 two completely different inspirations.

21 Essentially we have two products that are a
22 result of two very different paths.

23 The KAH Tequila brand -- and the word is
24 KAH, K-A-H. The KAH Tequila brand was the invention of
25 Kim Brandi. Kim Brandi is sitting right here in the

1 courtroom today. And you will hear from Ms. Kim -- from
2 Ms. Brandi when she takes the witness stand.

3 But for today Ms. Brandi, has to rely on me,
4 and Elements has to rely on me to provide a summary of
5 what the evidence is going to show here from our
6 perspective.

7 Ms. Brandi is going to be -- the evidence is
8 going to show that Ms. Brandi is the driving force
9 between KAH -- behind KAH Tequila. It was her idea. It
10 was her creation. And it was her dream to bring that
11 product to market.

12 And she did it independent of what the
13 Crystal Head Vodka folks were doing, what Mr. Aykroyd
14 was doing, and what Mr. Anderson was doing.

15 You will see from Ms. Brandi that she drew
16 upon her Mexican-American heritage in designing her
17 product.

18 She has extensive, as Mr. Berg said,
19 extensive experience in the beverage industry.

20 But what he didn't tell you is that she
21 started as a bartender and she worked her way up in the
22 industry to a publisher, to a designer.

23 And as many people do in that industry, you
24 get the idea to create your own type of liquor brand.
25 And she had that idea.

1 And the idea that she had which sparked when
2 she worked on a thing called the -- if I get the word
3 right -- Spirits of Mexico Festival in 2006. And she
4 started learning all about tequila. Tequila is a unique
5 product that is only made in one province of tequila.
6 It is extensively drunk in Mexico and also in this
7 country.

8 She learned how it was made. It is made
9 from agave, a plant. She learned how it is distilled.
10 She learned the certifications you need. She learned
11 all about tequila.

12 And then she had her idea. What if I make a
13 tequila with the Day of the Dead celebration themes?
14 What is the Day of the Dead? The Day of the Dead is an
15 ancient Mexican celebration.

16 It is now celebrated around the time the
17 Catholics celebrate All Souls Day and All Saints Day.
18 And it is a celebration of the life of the deceased
19 loved ones. And it is celebrated by visiting the graves
20 of the deceased. And it is celebrated by preparing
21 gifts and bringing them to the graves.

22 There are certain images associated with the
23 Day of the Dead that Ms. Brandi wanted to use: Death,
24 similar to the grim reaper; the devil; skeletons. She
25 wanted to put them on a tequila bottle. She thought she

1 had a great idea.

2 I'm going to marry the Day of the Dead
3 celebration, the uniquely Mexican holiday, with tequila,
4 the uniquely Mexico product.

5 What does she do? She started designing a
6 bottle. She was going about, trying to figure out what
7 kind of bottle to make. She was going to put it in a
8 black bottle with the characters on it.

9 She took her kids one day, the evidence will
10 show, to Venice Beach. If you've been to Venice Beach,
11 you know that there are people selling all sorts of
12 stuff out there.

13 And there was a big crowd gathered around a
14 bunch of tables. And on those tables piled high were
15 these little calaveras. Calaveras are caricatures
16 cartoons, most of a skull, that are prepared out of
17 sugar during the Day of the Dead celebrations.

18 And she had her essentially eureka moment.
19 What if I take these calaveras -- which, by the way,
20 were selling like hot cakes. People were paying 20
21 bucks for these little painted calaveras by these
22 artists. What if I married the calaveras to the Day of
23 the Dead celebration? That's what she started to do.

24 She didn't go find a bottle, Crystal Head
25 Vodka. What she did was she bought little calaveras.

1 She bought a pile of those, and you'll see pictures of
2 them at her kitchen table, to come up with this design,
3 the bottle -- she had to then figure out what art work
4 to put on it. And she did. She put on the skeleton.
5 Death. Diablito, the little devil.

6 Now, Mr. Berg in his opening, said there
7 were other bottles, but all he showed you were these.
8 Why? Because he thinks these look the same.

9 But this case here is about all of these
10 bottles. And does this trade dress -- when these
11 bottles are displayed next to each other in the store,
12 do they create the impression of their own trade dress,
13 or are they confusingly similar to that? We believe the
14 evidence will show absolutely no possibility of
15 confusion.

16 To finish with what Brandi will tell you.
17 She had to find a bottler. She had to find a producer
18 of premium tequila. She had to find a name. She chose
19 KAH. KAH is an ancient Mayan name. It means "life."

20 Consistent with the theme, Day of the Dead,
21 calaveras, tequila, Mexican, life. Day of the Dead
22 celebration being a celebration of life.

23 This took months and months and months. If
24 Ms. Brandi had simply bought this bottle and copied it,
25 that could have been done instantaneously. You make a

1 few alterations and you're done.

2 But just like the path that Mr. Alexander
3 and Mr. Aykroyd and the others at Globefill took, it
4 took a long, long time. The evidence will show that it
5 took Ms. Brandi a real long time.

6 She founded Elements so that she could
7 market the KAH Tequila. And everything seemed to be
8 going well. It seemed like her dream was going to be
9 realized.

10 And then, boom, out of the blue, Globefill
11 sends what Mr. Berg calls a cease and desist letter. A
12 cease and desist letter is either a politely or
13 impolitely worded letter that says: Stop what you are
14 doing or we are going to sue you.

15 And Globefill waited all of one week -- I
16 think it was even less than a week -- and sued
17 Ms. Brandi, and put everything into turmoil for her.
18 Delayed the introduction, as you will hear from her, of
19 her tequila bottle, delayed her dream while she found a
20 way around this lawsuit.

21 This started in a kitchen table. It didn't
22 start in an artist's loft. It wasn't a world renowned
23 artist that did this. This was one person and one
24 person's dream. And that person is in the courtroom,
25 and you will hear extensively from her.

1 The issue here, though, is likelihood of
2 confusion. And as you hear the evidence from all the
3 witnesses, I want you to keep a few things in mind about
4 whether there is truly any likelihood of confusion in
5 the eyes and minds of an ordinary consumer who is
6 exercising his or her common sense, because you don't
7 have to throw common sense out.

8 Would a person considering everything about
9 these bottles be confused between the two, between the
10 source or origin of them?

11 And there are a couple of things I want you
12 to think of as you hear the evidence. First, the two
13 brands used completely different marketing themes.

14 You heard, and you will hear, that KAH is
15 associated with the Day of the Dead, closely associated
16 with the Day of the Dead, a uniquely Mexican
17 celebration.

18 This skull is based on a completely
19 different theme. It is based on something called "The
20 legend of the 13 crystal skulls." Which Mr. Berg did
21 not mention in his opening, but you will hear
22 extensively about in this trial.

23 The legend, which I didn't know anything
24 about until I started working on this case, is that
25 aliens or star children, whatever you want to call them,

1 placed 13 crystal skulls thousands of years ago around
2 the world. And that they were used by shamans to see
3 into the future for their tribes.

4 That's the basis for this head. In fact,
5 Mr. Aykroyd, when he saw Mr. Alexander's drawings,
6 thought that this looked like one of the -- the drawing
7 looked like one of the skulls something called the
8 Mitchell-Hedges skull.

9 So the marketing campaign around Crystal
10 Head has been purity, purity, purity. Glass is pure.
11 The vodka is pure. There are no -- allegedly no
12 impurities in it whatsoever.

13 The whole idea was a Canadian product. And
14 there's a box, which you'll see. There's a box that
15 tells the story of the insert, which tells the story of
16 the 13 crystal skulls. And it talks all about the pure
17 waters of Newfoundland and the grain that's used from
18 Canada to make the vodka. So clarity, purity, all
19 playing off the legend of the 13 crystal skulls.

20 The tequila is made in four different
21 colors. And is marketed under the Day of the Dead
22 celebration.

23 Two, there are different liquids here. We
24 have the vodka from Canada, clear. We have tequila,
25 which is made from the agave plant in Mexico.

1 There is no cross-over between the products.
2 Crystal Head does not make a tequila. KAH does not make
3 a vodka. There is no cross-over.

4 And I'm sure many of you have been to a
5 liquor store or a grocery store or some other store that
6 sells different liquors, and the liquors are actually
7 sold in different locations, in the vast majority of
8 places, the evidence will show.

9 The vodka, logically enough, common sense
10 will tell you, is placed in the vodka section. The KAH
11 Tequila is placed in the tequila section.

12 The evidence will show that when someone
13 goes to shop for their favorite vodka, if it be Crystal
14 Head, they are not going to get confused if it's not
15 there and wander over to the tequila aisle and pick up
16 this because they think it's their own vodka.

17 There is not any possibility of confusion
18 here. It defies common sense. And there may be
19 instances where during Halloween the store may place a
20 bunch of products, these and others, bottles with
21 skeletons on it.

22 But consumers are -- they use common sense.
23 They know that if there is a display in the beginning of
24 the store with Halloween-themed products, that not all
25 of those products are made by the same producer. It is

1 just common sense.

2 Then, finally, you are going to hear a lot
3 of witnesses; but, unfortunately, the bottles, although
4 they have mouths, can't talk.

5 You are going to see and touch these
6 bottles. You are going to look at intricate details of
7 them.

8 Crystal Head -- and just to point out a few
9 of them, which are obvious to you sitting in the jury
10 box. Crystal Head Vodka is clear. The KAH Tequila
11 bottles are opaque. The Crystal Head bottle has no
12 decoration, sticking with its theme. The KAH Tequila
13 bottles are highly decorated.

14 Just look at the Resposado. The Resposado
15 has the diablito. It has burning eyes. It has teeth
16 that are painted on. It has decoration on this side.
17 Actually has all sorts of decorations on it. The others
18 are equally decorated.

19 The texture of the bottles, as you felt
20 them, two of them, is very different. This is meant to
21 be an anatomically correct skull. And there will be
22 testimony about that. There are teeth. There are
23 temples. There are eye sockets.

24 This is meant to be a caricature, calaveras.
25 It has cheeks that you would never see in a skull. It

1 looks completely different. It is flatter. It's
2 shorter.

3 These are different bottles. They are very
4 different bottles. Which create a very different
5 impression to the consumer of alcohol beverages. Don't
6 get me wrong.

7 THE COURT: Counsel has four minutes.

8 MR. HUMMEL: Yes, Your Honor. I'm almost
9 done.

10 Don't get me wrong, these are works of art.
11 This is not a cheap knockoff. These are works of art.
12 They are works of art that should be able to co-exist
13 with each other. Because consumers are not going to be
14 confused about it.

15 They are works of art, but they are very,
16 very, very different works of art.

17 And I think you will see that as you hear
18 the evidence in the time that we spend with each other.

19 That concludes my remarks. I don't know if
20 Mr. Miller has anything to add to that. But, you know,
21 I want to also in advance thank you for your time.

22 At the conclusion of this trial, I'm going
23 to be standing up here at this podium again, but this
24 time I'm going to -- you will have heard all the
25 evidence, and I'm going to demonstrate to you that what

1 I just told you, the stories that I just told you, which
2 as the Court told you are not evidence, are absolutely
3 true and are backed up by the evidence that you will
4 have seen throughout this trial.

5 And I want you to hold me and everybody else
6 in courtroom to that standard. And then I will ask you
7 to render a verdict for any client, Elements Spirits.
8 Thank you very much.

9 THE COURT: Defense has two minutes left.

10 MR. MILLER: Thanks for that.

11 MR. BERG: Sorry.

12 MR. MILLER: Well, I have 98 seconds. I
13 thank you all again, as everybody has, for your service.

14 Yesterday was a tough day for all of us, and
15 you guy all toughed through it. At least, I think, from
16 this point on, it will be a little more interesting.
17 And I hope we can move through it as quickly as
18 possible. I do.

19 I'm John Miller. I represent Kim Brandi.
20 Kim Brandi is not a thief. The evidence is going to
21 show that her efforts to create the KAH Tequila brand
22 were as painstaking and it took as long at the efforts
23 made in the creation of this other fine product. These
24 are good products. They developed simultaneously. One
25 I think is an amazing piece of folk art, and one is very

1 interesting from an anatomical standpoint.

2 You are going to -- you will meet Kim
3 Brandi. You learn very quickly that she is not a thief.
4 That is all I have to say right now. Thank you.

5 THE COURT: Now that the jurors have heard
6 the opening statements by both sides, I will be reading
7 to you some preliminary instructions that will give you
8 guidance as you serve as jurors in the case.

9 After all the evidence has been presented
10 and the closing arguments by counsel, I will read
11 instructions of law. During the course of presentation
12 of evidence, I may read some of the instructions to help
13 you follow the evidence that's being given and
14 understand what the law requires or what the law says
15 about the legal issues that will ultimately be
16 determined as the jury finds the facts.

17 You are now the jury in the case. It is my
18 duty to instruct you on the law. It is your duty to
19 find the facts from all the evidence in the case. To
20 those facts, you will apply the law as I give it to you.
21 You must follow the law as I give it to you whether you
22 agree with it or not. And you must not be influenced by
23 any personal likes or dislikes, opinions, prejudices, or
24 sympathy.

25 That means that you must decide the case

1 solely on the evidence before you. You will recall that
2 you took an oath to do so. At the end of the trial, I
3 will give you final instructions. It is the final
4 instructions that will govern your duties.

5 Please do not read into these instructions
6 anything that I may say or do that I have an opinion
7 regarding the evidence or what your verdict should be.

8 When a party has the burden of proving any
9 claim by a preponderance of the evidence, it means you
10 must be persuaded by the evidence that the claim is
11 probably true than not true.

12 You should base your decision on all the
13 evidence, regardless of which party presents it.

14 You must decide the case as to each
15 defendant separately. Unless otherwise stated, the
16 instructions apply to all parties.

17 What is the evidence? The evidence that you
18 are to consider in deciding what the facts are consists
19 of: One, the sworn testimony of any witness; two, the
20 exhibits which are admitted into evidence; three, any
21 facts to which the lawyers have agreed; and four, any
22 facts that might -- that I may instruct you to accept as
23 proved.

24 Some things are not evidence. And this
25 instruction helps -- gives you guidance as to what those

1 things may be. In reaching your verdict, you may
2 consider only the testimony and the exhibits received
3 into evidence.

4 Certain things are not evidence, and you may
5 not consider them in deciding what the facts are. I
6 will list them for you. Number one: Arguments and
7 statements by lawyers are not evidence.

8 So you just heard the opening statements by
9 the attorneys, and that's not evidence.

10 The lawyers are not witnesses. What they
11 have said in their opening statements may -- and in
12 their closing arguments, and at other times is intended
13 to help you interpret the evidence but is not evidence.

14 If the facts, as you remember them, differ
15 from the way the lawyers have stated them, it is your
16 memory of them that controls.

17 Two, any questions or objections by lawyers
18 are not evidence. Attorneys have a duty to their
19 clients to object when they believe a question is
20 improper, under the rules of evidence.

21 You should not be influenced by the
22 objection or by the Court's ruling on it.

23 Number three, testimony that is excluded or
24 stricken or that you are instructed to disregard is not
25 evidence and must not be considered.

1 In addition, some evidence may be received
2 only for a limited purpose. When I instruct you to
3 consider certain evidence only for a limited purpose,
4 you must do so, and you may not consider that evidence
5 for any other purpose.

6 Number four, anything that you may see or
7 hear when the Court is not in session is not evidence.
8 You are to decide the case solely on the evidence
9 received at trial.

10 So it may be that if you were in common
11 areas of the courthouse, you may see parties in this
12 case or the attorneys talking, that's -- if you overhear
13 their conversation, that's not evidence because we are
14 not in session.

15 So this instruction gives you guidance. In
16 session means that you are in the box, the Judge is on
17 the bench, and the lawyers are at their tables. That
18 means we are in session.

19 So anything else that you may see or hear
20 when we are not in session is not evidence in the case,
21 even if you think it may be related to the case.

22 And I ask that you bring that to my
23 attention. So if you overhear something, you see
24 something, you have some confusion, well, is that
25 something we should consider? Is it evidence? You will

1 tell the courtroom deputy. She will relay that to me,
2 and I will speak with you if it is necessary.

3 Some evidence may be admitted only for a
4 limited purpose, and that does happen in some trials.
5 And when it does occur, the Court gives an instruction
6 to the jury as to the purpose for which this evidence
7 has been received, and you must follow that limiting
8 instruction.

9 Evidence may be direct or circumstantial.
10 Direct evidence is direct proof of a fact; such as
11 testimony by a witness about what that witness
12 personally saw or heard or did.

13 Circumstantial evidence is proof of one of
14 more facts from which you may find another fact.

15 You should consider both kinds of evidence.
16 The law makes no distinction between the weight to be
17 given to either direct or circumstantial evidence. It
18 is for you to decide how much weight to give to any
19 evidence.

20 There are rules of evidence that control
21 what can be received into evidence.

22 When a lawyer asks a question or offers an
23 exhibit into evidence, and the lawyer on the other side
24 thinks it is not permitted by the rules of evidence,
25 that lawyer may object.

1 If I overrule the objection, the question
2 may be answered or the exhibit received. If I sustain
3 the objection, the question cannot be answered and the
4 exhibit cannot be received.

5 When I sustain an objection to a question,
6 you must ignore the question. You must not guess what
7 the answer might have been.

8 Sometimes I may order that evidence be
9 stricken from the record, and that you disregard or
10 ignore that evidence. That means that when you are
11 deciding the case, you must not consider the stricken
12 evidence for any purpose.

13 In deciding the facts in the case you may
14 have to determine which testimony to believe, which
15 testimony not to believe.

16 You may believe everything a witness says or
17 part of it or none of it. In considering the testimony
18 of any witness, you may take into account, number one,
19 the opportunity and ability of the witness to see or
20 hear or know the things testified to.

21 Number two, the witness' memory. Number
22 three, the witness' manner while testifying. Number
23 four, the witness' interest in the outcome of the case,
24 if any. Number five, the witness' bias or prejudice, if
25 any. Number six, whether other witnesses contradicted

1 the witness' testimony. Number seven, the
2 reasonableness of the witness' testimony in light of all
3 the evidence. And number eight, any other factors that
4 bear on believability.

5 Sometimes a witness may say something that
6 is not consistent with something else he or she said.
7 Sometimes different witnesses will given different
8 versions of what happened. People often forget things
9 or make mistakes in what they remember. Also, two
10 people may see the same event or remember it
11 differently.

12 You may consider these differences. But do
13 not decide that testimony is untrue just because it
14 differs from other testimony.

15 However, if you decide that a witness has
16 deliberately testified untruthfully about something
17 important, you may choose not to believe anything that
18 witness said.

19 On the other hand, if you think the witness
20 testified untruthfully about some things but told the
21 truth about other things, you may accept the part you
22 think is true and ignore the rest.

23 The weight of the evidence as to a fact,
24 does not necessarily depend on the number of witnesses
25 who testify. What is important is how believable the

1 witnesses were and how much weight you think their
2 testimony deserves.

3 Let me say a few words about your conduct as
4 jurors. First, keep an open mind throughout the trial.
5 Do not decide what the verdict should be until you and
6 your fellow jurors have come completed your
7 deliberations at the end of the case.

8 Second, because you must decide this case
9 based only on the evidence received in the case and on
10 my instructions as to law that applies, you must not be
11 exposed to any other information about the case or the
12 issues it involves during the course of your jury duty.

13 Thus, until the end of the case or unless I
14 tell you otherwise, do not communicate with anyone in
15 any way. Do you not let anyone else communicate with
16 you in any way about the merits of the case or anything
17 to do with it.

18 This includes discussing the case in person,
19 in writing, by phone, or electronic means, via email,
20 text messaging or any Internet chatroom, blog, Website
21 or application, including but not limited to Facebook,
22 YouTube, Twitter, Instagram, LinkedIn, Snapchat or any
23 other form of social media.

24 This applies to communicating with your
25 fellow jurors until I give you the case for

1 deliberation, and it applies to communicating with
2 everyone else, including your family members, your
3 employer, the media, or the press. And the people
4 involved in the trial.

5 Although you may notify your family and your
6 employer that you have been seated as a juror in the
7 case, and how long you expect the trial to last, but if
8 you're asked or approached in any way about your jury
9 service or anything about this case, you must respond
10 that you have been ordered not to discuss the matter and
11 report that contact to the Court.

12 Because you will receive all the evidence
13 and the legal instructions you properly may consider to
14 return a verdict, do not read, watch or listen to any
15 news or media accounts or commentary about the case or
16 anything to do with it.

17 Although I have no information that there
18 will be news reports about the case, do not do any
19 research, such as consult in dictionaries, searching the
20 Internet or using other reference materials.

21 And do not make any investigation or in any
22 other way try to learn about the case on your own. Do
23 not visit or view any place that is discussed in the
24 case.

25 Do you not use Internet programs or other

1 devices to search for or view any place discussed during
2 the trial.

3 Also, do not do any research about the case,
4 the law, or the people involved, including the parties,
5 the witnesses or the lawyers until you have been excused
6 as jurors.

7 If you happen to read or hear anything
8 touching on this case in the media, turn away and report
9 it to me as soon as possible. So if it's print
10 material, I instruct you to bring it in with you, if you
11 read something, even though inadvertent. Do not show it
12 to any of the jurors. And do not discuss it with them.

13 You would give it to the courtroom deputy.
14 She would give it to me. I would review it and question
15 you if I think necessary.

16 These rules protect each party's right to
17 have this case decided only on the evidence that has
18 been presented here in court. Witnesses here in court
19 take an oath to tell the truth. And the accuracy of
20 their testimony is tested through the trial process.

21 If you do any research or investigate
22 outside the courtroom or gain any information through
23 improper communications, then your verdict may be
24 influenced by inaccurate, incomplete or misleading
25 information that has not been tested by the trial

1 process.

2 Each of the parties is entitled to a fair
3 trial by an impartial juror. And if you decide the case
4 based on information not presented in the court, you
5 will have denied the parties a fair trial.

6 Remember, you have taken an oath to follow
7 the rules. And it is very important that you follow
8 these rules.

9 A juror who violates these restrictions
10 jeopardizes the fairness of these proceedings, and a
11 mistrial could result, that would require the entire
12 trial process to start all over again, including jury
13 selection. If any juror is exposed to any outside
14 information, please notify the Court immediately.

15 If there are any news media accounts or
16 commentary about the case or anything to do with it, you
17 must ignore it. You must not read, watch, listen to any
18 news media account or commentary about the case, or
19 anything to do with this.

20 The case must be decided by you solely and
21 exclusively on the evidence that will be received in the
22 case, and on my instructions as to the law that applies.

23 If any juror is exposed to any outside
24 information, please notify me immediately.

25 I urge you to pay close attention to the

1 trial testimony as it is given. During deliberations
2 you will not have a transcript of the trial proceedings.
3 So even though we have a reporter here taking down every
4 word, it may be transcribed, it may not; but that
5 transcript would not be available to the jury.

6 You will be relying on your memory, and any
7 notes that you may take.

8 If you wish, you may take notes, and that's
9 why we gave you the note tablets, to help you remember
10 the evidence.

11 If you do take notes, please keep them to
12 yourselves until you go to the jury room to decide the
13 case.

14 Do not let notetaking distract you. When
15 you leave, your notes should be left in the courtroom.
16 No one will read them. They will be returned to you the
17 next day.

18 And then when you go in to deliberate after
19 the end of the case, all the evidence is in, arguments
20 have been made, instructions have been given, then you
21 may take the note tablets with you.

22 There should not be any other notes in those
23 notebooks, because we are supposed to destroy those
24 after a jury is excused. So if you find any notes, then
25 you need to bring that to the Court's attention.

1 Whether or not you take notes, you should
2 rely on your own memory of the evidence. Notes are only
3 to assist your memory. You should not be overly
4 influenced by your notes or those of other jurors.

5 And notetaking is like taking notes
6 anywhere, this is not different. So if you attend a
7 lecture or if you are work and someone is giving you
8 information, you may take notes. But here remember,
9 observing the witness' demeanor on the witness stand may
10 be something that is important to your fact-finding
11 function.

12 If you are not observing the witness because
13 you are busy taking notes, that may be distracting, then
14 you don't have that observation to consider during your
15 deliberations.

16 A question that's commonly asked is whether
17 the jurors are permitted to ask questions during the
18 presentation of evidence. And the answer to that is
19 yes, you are permitted to ask questions. This
20 instruction gives you guidance as to how that will be
21 done.

22 You will are allowed to propose written
23 questions after the lawyers have completed their
24 questioning of each witness. You may propose questions
25 in order to clarify the testimony. But you are not to

1 express any opinion about the testimony or argue with
2 the witness. If you propose any questions, remember
3 that your role is that of a neutral fact finder, not an
4 advocate.

5 Before I excuse each witness, I will offer
6 the opportunity to write out a question on a form
7 provided by the Court. Do not sign the question. I
8 will review the question with the attorneys to determine
9 if it is legally proper.

10 So sometimes jurors may ask a question and
11 none of us have the answer to that question, because
12 this is a real situation that occurred. It is not a
13 play that someone has written or a book that someone has
14 written. So it could be that the answer will be, We
15 don't know.

16 Other times jurors may ask questions about
17 things that are not relevant, have nothing to do with
18 the issues in this case, you are just curious. And the
19 answer to that may be: Not relevant.

20 And then there are times that jurors will
21 ask a question, and the Court and the parties know that
22 another witness is going to testify to that subject,
23 that is the subject of your question. So that answer
24 may be, there will be a witness called later and that
25 witness will explain.

1 However, since you are the fact finders, as
2 you are listening to testimony, you may think of a
3 question that you would like to have answered. So you
4 are permitted to put that question in writing and pass
5 it up. And if we can answer it, we will do so. As I
6 said, if another witness is going to testify on that
7 subject, that may be the instruction or the response the
8 Court will give.

9 Witnesses are sometimes excused after they
10 give their testimony. That's means they are free to
11 leave. They are not here in the courthouse. They may
12 go to work, home, whatever they would typically be
13 doing. So if you wait to ask your questions after the
14 witness has been excused or during deliberations, it
15 maybe that that witness is no longer available to answer
16 that question. So we may not be able to give you an
17 answer because the witness has now left. That's why the
18 Court will wait before the Court excuses a witness to
19 respond to any question that you may have.

20 There are some proposed questions that I
21 will not permit or I will not ask in the wording that's
22 been submitted by the jury. This might happen either
23 due to the rules of evidence or other legal reasons, or
24 because the question is expected to be answered later in
25 the case.

1 If I do not ask a proposed question, or if I
2 rephrase the question, do not speculate as to the
3 reasons. Do you give undue weight to questions you or
4 other jurors propose. You should evaluate the answers
5 to these questions in the same manner that you evaluate
6 all of the evidence.

7 By giving you the opportunity to propose
8 questions, I am not requesting or suggesting that you do
9 so. It will often be the case that a lawyer has not
10 asked a question because it is legally objectionable or
11 because a later witness may be addressing that subject.

12 So if you have a question, what we ask you
13 to do is not to identify yourself. Don't say "This is
14 from Juror No. 1," or don't put your name on it. You
15 pass it down to the end of the jury box. That juror,
16 Juror No. 8, would hold up the paper.

17 Hopefully we are all paying attention and
18 we'll notice there's a question. The courtroom deputy
19 will take it. I will read it, discuss it with the
20 lawyers before the witness leaves, and then try to
21 respond to your question.

22 From time to time during the trial it may be
23 necessary for me to talk with the attorneys out of the
24 hearing of the jury, either by having a conference at
25 the bench when the jury is present in the courtroom or

1 by calling a recess.

2 Please understand that while you are
3 waiting, we are working. The purpose of these
4 conferences is not to keep relevant information from
5 you, but to decide how certain evidence is to be treated
6 under the rules and evidence and to avoid confusion and
7 error.

8 Of course, we will do what we can to keep
9 the number and length of these conferences to a minimum.
10 I may not always grant an attorney's request for a
11 conference. Do not consider my granting or denying a
12 request for a conference as any indication of my opinion
13 of the case or what your verdict should be.

14 Now, you saw some of this yesterday when we
15 were selecting the jury, we went to sidebar and talked
16 to jurors. I do try to minimize these conferences. As
17 a matter of fact, I try not to have sidebars. And
18 that's one of the reasons for the hours that you will be
19 working.

20 When the jury is excused for the day, then
21 the Court will meet with counsel to discuss anything
22 that may come up the following day, so that the Court
23 can rule on those things if necessary or give guidance
24 to the lawyers. That way we can avoid sidebars. So
25 that when you are in the box, you are actually listening

1 to testimony that's being given by the witnesses.

2 So last night after you left we continued to
3 work here to try to settle things that would be
4 presented to you today in the form of evidence.

5 Trials proceed in the following way. First,
6 each side may make an opening statement. And you've
7 heard that. The opening statement is not evidence as I
8 indicated. It is simply an outline to help you
9 understand what that party expects the evidence will
10 show. A party is not required to make an opening
11 statement. But in this case, you did hear from both
12 sides.

13 The plaintiff then presents evidence. So
14 the plaintiff goes first, and counsel for the defendant
15 may cross-examine any witness who were called by the
16 plaintiff. Or in some instances, the defendant was
17 planning to call that same witness, so the defendant
18 will conduct its examination. So the jury gets to hear
19 all that is being offered, all the evidence is being
20 offered through a particular witness. So that we don't
21 have to call the witness back next week or some other
22 day. You should hear it while the witness is on the
23 stand.

24 After evidence has been presented and both
25 sides have rested, closing arguments will be made by the

1 attorneys and the Court will then instruct you on the
2 law.

3 So the last thing that you will hear will be
4 instructions of law, the case will then be given to the
5 jury so that you can retire to deliberate.

6 That completes the read of the preliminary
7 instructions.

8 We will take our morning break probably an
9 hour from now. Why don't we stand and stretch before we
10 start the presentation of evidence.

11 THE CLERK: So it appears the jury would
12 like to take the break now.

13 THE COURT: Why don't we take the morning
14 break at this time. The break will be 15 minutes. So
15 during that time take care of personal needs. But also
16 for those of you who want coffee or something that may
17 be available to you in the jury room, this would be time
18 to do it.

19 When you come back, we will be sitting and
20 in session for two hours. We are in recess now.
21 15 minutes.

22 (15-MINUTE RECESS.)

23 THE COURT: Thank you. You may be seated.
24 The first witness may be called.

25 MR. BERG: Your Honor, I call John Alexander

1 to the stand.

2 THE COURT: The witness will come forward.
3 This is the witness box. The clerk will administer the
4 oath.

5 Will you be using exhibits with the witness?

6 MR. BERG: Pardon me, ma'am?

7 THE COURT: Will you be using exhibits with
8 the witness?

9 MR. BERG: Yes, I will.

10 THE COURT: And those have been identified
11 so the counsel knows which?

12 MR. BERG: We identified them together.

13 THE COURT: They are all deemed admitted?

14 MR. BERG: Yes, Your Honor.

15 THE COURT: I believe last night.

16 So you may use them since they are in
17 evidence.

18 MR. BERG: Thank you.

19 And I will be asking the deputy clerk to
20 pass the exhibits to the witness at a point.

21 THE COURT: Exhibits meaning the containers
22 that are at issue?

23 MR. BERG: Yes. Thank you.

24

25 JOHN ALEXANDER,

1 Called as a witness herein, having been first duly
2 sworn on oath, was examined and testified as follows:

3 THE CLERK: Have a seat. State and spell
4 your name for the record.

5 THE WITNESS: My name is John Alexander,
6 J-O-H-N, A-L-E-X-A-N-D-E-R.

7 MR. BERG: My I proceed?

8 THE COURT: Counsel may proceed.

9

10 **DIRECT EXAMINATION**

11 BY MR. BERG:

12 Q. Mr. Alexander, introduce yourself to the jury
13 again, if you will, and tell them where you were born.

14 A. My name John Alexander. And I was born near the
15 Louisiana-Texas border, down in the Gulf Coast, in the
16 town of Beaumont, Texas.

17 Q. I would like now just to go through your
18 education if we might. Where did you attend high
19 school?

20 A. I went to public school in Beaumont, Texas to --
21 1 through 10. And then I went to high school also in
22 Beaumont, Texas.

23 Q. Is that where you graduated, same city?

24 A. Yes.

25 Q. Did you get any graduate education, college

1 education?

2 A. Upon graduation from high school, I went
3 immediately to a small university in my home town, Lamar
4 University. And then --

5 Q. Did you -- after you graduated -- well, tell us
6 what degree you had at Lamar.

7 A. I got a bachelor of arts degree in -- officially
8 it's commercial art, but the major thrust of it was
9 painting and drawing.

10 Q. Did you have a particularly inspiring professor
11 there?

12 A. Yes, I did. My -- the future of my career, the
13 trajectory that I went on after graduating from
14 university was set in motion by a very good professor
15 who was an academician who taught art in a very
16 old-fashioned way, learning how to draw from models and
17 skulls and skeletons and still lives. Before you could
18 move up to the next level, you had to become proficient
19 in that. It was a very academic style of education that
20 he instilled in me. That was what I think made it
21 possible for me to go on and continue to have a career
22 in art.

23 Q. Did you go immediately -- I know went to graduate
24 school. Did you immediately go to graduate school?

25 A. As soon as I graduated from Lamar University, I

1 went -- I taught high school for two years at Port
2 Neches-Groves High School, a suburb of Beaumont, between
3 Beaumont and Port Arthur.

4 Q. What did you teach?

5 A. I taught art classes.

6 Q. And after you -- why did you not go into graduate
7 school immediately?

8 A. Financially it seemed to make sense to get some
9 money together. Also, I thought it was a wonderful
10 opportunity that was afforded to me to teach, and I
11 thought it would give me experience and help me as I
12 moved forward in my career.

13 Q. After Port Neches High School, where did you go?

14 A. I went to graduate school at SMU, Southern
15 Methodist University in Dallas, Texas.

16 Q. What degree did you receive?

17 A. A master of fine arts.

18 Q. Can you tell the jury what your focus was there?

19 A. Painting and drawing.

20 Q. And after what -- you got a master's in fine
21 arts?

22 A. Yes.

23 Q. And after that, what was your next -- where did
24 you go next?

25 A. As soon as I graduated, I moved from Dallas to

1 Houston, Texas, where I set up a studio in an old house.
2 I started my career there in Houston.

3 Shortly after I moved to Houston, I got another
4 opportunity. Someone called me and asked me if I would
5 be a drawing instructor at the University of Houston.
6 And I said yes.

7 And that ended the painting and drawing. I ended
8 up teaching at the University of Houston from 1971 to
9 1979.

10 Q. Were you selling your paintings at that point?

11 A. Just gradually over that period of time I sold
12 paintings, yes.

13 Q. Let me take you back now, to give the jury an
14 idea of some of the work you did as a young man.

15 How would you describe the family you came from?

16 A. Well, Beaumont was a -- what's written about is a
17 bleak Gulf Coast industrial town. It was docks and
18 shipbuilding and refineries, and surrounded by these
19 very beautiful swamps and bayous -- what you think of as
20 traditional West Louisiana, East Texas bayous, what you
21 might call alligator country.

22 They were shipbuilding and refineries and -- my
23 father was a much older man. He retired before I was
24 born and he retired from working as a construction man
25 primarily in the oil industry. But he was construction

1 engineer. My mother was a clerk at a drug store and
2 also a nurse.

3 Q. If I might interrupt for a moment, let's talk
4 about your relationship with your father for a minute.
5 Did that have any effect on your art career?

6 A. The fact that he was older allowed him -- and was
7 retired, allowed him to spend time with me as a little
8 boy. So when I was growing up --

9 Q. Mr. Alexander, how old was your dad when you were
10 born?

11 A. He was 68.

12 Q. How many years did you have your dad?

13 A. He died when I was 19 years old.

14 Q. What happened in between that had an effect on
15 your art career?

16 A. Well, he made -- he allowed me to become an avid
17 naturalist. I loved being outdoors. I loved to go in
18 the bayou country and fish, camp out. We spent enormous
19 amounts of time because we had that opportunity to spend
20 in nature. And he was a great naturalist and a very
21 avid believer in the outdoors. And so he instilled that
22 in me.

23 Q. How did that translate later into your painting?
24 What is your main kind of painting?

25 THE COURT: We have two questions. One,

1 please.

2 MR. BERG: I'm sorry.

3 BY MR. BERG:

4 Q. What is your main kind of painting?

5 A. We'll, I'm primary known as a person who paints
6 kind of romanticized landscapes; bird life landscape,
7 birds in their natural environment, that kind of thing.

8 Q. Let me ask you to tell the jury some of the jobs
9 that I mentioned earlier that you had as a young man.

10 A. The first job I ever had was my mother -- I was a
11 teenager, early teens. My mother was a clerk in the
12 drug store, as I said. And I got a job on the delivery
13 truck delivering prescriptions. And that went -- I got
14 another job that was better paying later delivering
15 parts for an electronic firm. And then as I got older,
16 I went to work in the oil fields doing construction
17 work.

18 Q. I take it those weren't the Alexander oil fields?

19 A. No, they were not the Alexander oil fields.

20 But I would go out and -- into these drilling
21 platforms and stuff where we were building these roads.

22 Then I also had a job, brief job when I was in
23 high school, as a -- in the food industry, I peeled
24 shrimp for a catering firm that serviced banquets. So
25 we just sat there for hours. I don't know which just

1 was worse though, the shrimp paying job or the oil field
2 job. But that's way I started out as a young worker.

3 Q. Let me take you back up now to your move to
4 Houston. You said you were there I think until 1979?

5 A. '78, '79. '78, I started spending a lot of time
6 in New York, but I still kept my job at the University
7 of Houston. I was there in Houston, had presence in
8 Houston until the end of the '70s.

9 Q. Let me break -- ask you to tell us, when you
10 moved to New York -- and to bring it to closer to home
11 here, when exactly did you move to New York?

12 A. I moved completely -- I -- the place I live now,
13 I got in January of 1980. But I sublet a place where --
14 from someone in '79. But in 19 -- late '79, '80, I was
15 living there full time.

16 Q. Is this when you met Dan Aykroyd?

17 A. Yes. Late '70s.

18 Q. Do you remember exactly when you met Danny?

19 A. Yes.

20 Q. Under what circumstances did you meet him?

21 A. Well, I met a young lady who worked at the
22 television show Saturday Night Live as a writer. And
23 that -- I was very attracted to her and fancied her, I
24 guess. And Dan, at that time was -- she was his
25 girlfriend. And Dan was away making a promotion on the

1 Blues Brothers movie. And so I guess you could say I
2 stole his girlfriend. That's how we met.

3 Q. And did -- tell -- if you will, tell the jury the
4 first time you actually met Dan.

5 A. I vividly remember, we were in a bar, the young
6 lady and I. And he'd come back to New York. And
7 somebody said Dan's up at the front of the bar and he
8 would like to meet John. I thought, Oh, this is not
9 going to be good, because he's bigger than me and
10 younger. But I said, Well, I have to meet him at some
11 point. So I go introduce myself. And it just was the
12 most amazing thing, we just became -- we just kind of
13 hit it off.

14 And instead of just, you know, being nasty about
15 it, we became friends. And we've been good friends ever
16 since.

17 Q. How would you describe the relationship, the
18 depth of the relationship?

19 A. My relationship with Dan?

20 Q. Yes.

21 A. Well, it's grown over the years. We became
22 friendly right off. In fact, the then girlfriend and
23 him, and then he had another girlfriend, we all became
24 quite friendly with each other and socially.

25 And over the years, we just would do things. We

1 would go on trips. I would go to see him in Canada or
2 we'd go places, as couples often do. And then as the
3 time went on and he got married and had kids, my family
4 and his family became even closer, we traveled together.
5 We've had a rather unique friendship actually for all
6 these years.

7 Q. You mentioned family. Are you a married man?

8 A. Yes.

9 Q. And do you have a son?

10 A. Yes.

11 Q. And where does he live?

12 A. Los Angeles, California.

13 Q. Are you happy about that?

14 A. Well, I would be happy if he was close to home.
15 But I'm happy that he has got a job.

16 Q. Let me take you -- during this period of time,
17 Mr. Alexander, 1980 to meet Dan, your relationship --

18 A. '79.

19 Q. '79. Forgive me.

20 Did you continue your painting career?

21 A. Yes.

22 Q. And did you have a gallery, for instance, where
23 you sold your art?

24 A. Yeah. I had a number of galleries around that
25 sell my art.

1 Q. Just give us an idea -- give us an idea of some
2 of the galleries that handled your art.

3 A. Well, I've shown -- I've shown in Los Angeles for
4 many years, Melrose. I think it's called Jan Turner
5 Gallery. That gallery was there for 20 or more years.
6 And closed because of an illness to her. I've shown at
7 another gallery her in Los Angeles on Robertson Street.
8 I've shown in Chicago, all over Texas, Boston,
9 Philadelphia.

10 Q. What about New York?

11 A. I have been showing my work in New York since
12 1977.

13 Q. During this period of time, have museums acquired
14 your art?

15 A. Yes.

16 Q. Tell us -- will you tell us some of the museums?

17 A. Well, I'm proud to say that there are museums in
18 this area that have my work. San Diego Contemporary Art
19 Museum has maybe, I think, two pieces. And the
20 Los Angeles County Museum of Art has a piece. And MOCA,
21 Museum of Contemporary Art, here in Los Angeles has my
22 work. And I have work in museums in Texas and Florida,
23 and New York, Washington, D.C. --

24 Q. Tell us the name --

25 A. -- a lot of smaller cities.

1 Q. Tell us the name of the museum in New York and
2 the one in D.C.

3 A. Well, the primary -- the museum that has my work
4 in the New York is the Metropolitan Museum. And the
5 museum in Washington, D.C., is the Smithsonian Museum of
6 American Art. And then also the -- there are a couple
7 of other museums in Washington that have my work.

8 Q. Would the tell the jury where your last show was.

9 A. My last show was -- ended in April -- of this
10 past April, in San Francisco.

11 Q. And what -- which gallery was that?

12 A. Called the John Berggruen Gallery.

13 Q. Let me take you forward now in point of time to
14 the first discussion of the skull-shaped bottle.

15 Do you recall when that happened, when -- the
16 first discussion with Danny?

17 A. Yes, I do.

18 Q. Tell us about that.

19 A. Well, we had kind of a thing we did. He was
20 living in New York at the time. His kids were in school
21 in New York. And we would meet, at least once a month,
22 sometimes more often, but we had a restaurant,
23 seafood-oyster bar that we liked very much in lower
24 Manhattan.

25 And we'd go there in the afternoons. And we

1 would have these big afternoon eating orchards and
2 talking about stuff. It was the thing we did.

3 And one day we were there, and he started telling
4 me about Patron Tequila and his involvement in it. I
5 wasn't -- it is something that he just got involved
6 with. And he was very excited about his involvement in
7 it. He had the distributorship of Patron.

8 And so we went back to my studio that night. We
9 got very animated talking about all that. And I said --
10 in passing, I had many, many years before that, many
11 years before, I had come up with an idea to do an
12 alcoholic beverage and use a skull as the vessel for an
13 alcoholic beverage. And I don't know why it just
14 came -- it was something I thought of.

15 You see -- what they call them? These bottles
16 that are -- decanters. They call them decanters. You
17 see an Elvis decanter bottle. I've seen gun decanter
18 bottles. And Mickey Mouse. Whatever. You see them
19 come and go.

20 And I thought, why hasn't someone done a
21 skull-shaped liquor bottle? I mean, that seems like it
22 would be popular, a good idea.

23 So I mentioned it to a friend who was thinking
24 about into the liquor business, and he didn't think it
25 was that interesting of an idea. I kind of scraped it.

1 Never thought about it for many years.

2 Q. And did Mr. Aykroyd's discussion of his own
3 business bring this memory?

4 A. It brought it back, yes, 100 percent.

5 Q. Was he referring to his distributorship in
6 Canada?

7 A. The Patron business --

8 THE COURT: Wait, sir.

9 MR. RAFFERTY: Your Honor, I've been sitting
10 quietly, but this is now entirely leading.

11 THE COURT: Yes, it is leading. And I would
12 sustain the objection. And Counsel may ask a
13 non-leading question.

14 BY MR. BERG:

15 Q. What happened next?

16 A. What happened next is we went back to my studio
17 and worked up some ideas. And I began shortly after
18 that doing drawings to come up with the design for it.

19 Q. And tell the -- if you will, did you have any
20 conditions about going into this venture?

21 A. Because of the nature of what I did, I did not
22 want to do -- I was very clear that if we are going to
23 do something like this, because I was very nervous about
24 doing it, if we were going to -- if I was going to do
25 something like that, I wanted to make certain that we

1 did the due diligence and that there were no others that
2 existed.

3 Q. What do you mean by due diligence, sir?

4 A. Checking with patents, trademarks, seeing if
5 there's any in the liquor stores or in the liquor
6 industry.

7 MR. RAFFERTY: Your Honor, this has just
8 crossed directly into an area that was the subject of a
9 motion before the Court.

10 THE COURT: Well, I will ask you, maybe you
11 can just communicate with counsel, and he can ask a
12 different question. And if necessary to discuss it, we
13 will.

14 MR. BERG: If I might lead a bit, Your
15 Honor, to avoid the problem.

16 THE COURT: Any objection to him leading --

17 MR. RAFFERTY: Not if we avoid the problem,
18 Your Honor.

19 THE COURT: All right. Counsel.

20 BY MR. BERG:

21 Q. Was any other bottle, skull bottle, skull-shaped
22 bottle found that was used to sell alcohol?

23 A. No.

24 Q. Would you tell the jury what the process was,
25 sir -- or was there a process in arriving at the

1 skull-shaped bottle?

2 A. The process was a series of many, many drawings
3 over a period of time to try to get the feeling and look
4 of what we wanted to use to make this product.

5 And my input was simply drawing of ideas as
6 designs and -- with Dan's input and feedback a lot. And
7 we just simply worked -- I digitally worked up an idea
8 that I thought was something that would be appealing and
9 artistically pleasant to look at and something that the
10 consumer would want.

11 In this case, I'm not trying to make an art work,
12 I'm trying to make a product for consumers. And I --
13 I've never done that in my career, ever. And it was
14 very new to me. So it was very difficult for me to come
15 up with this --

16 Q. Did you --

17 A. -- to make all that work together.

18 Q. Did you run into particular issues in arriving at
19 the skull head bottle?

20 A. Well, Dan and I from the beginning of this
21 project were very -- we did not want the skull to look
22 like a pirate or something threatening or scary because
23 we wanted it to be something that the consumer would
24 find appealing.

25 So I tried very hard to make it something

1 that was not like what you would see on a biker's jacket
2 or -- the skull is used so much. I wanted to try to
3 come up with something that was not part of that world,
4 but just something that was my own invention.

5 Q. Did you arrive at your own invention, sir?

6 A. Yes.

7 Q. Did you have -- could you please tell us -- or
8 could you demonstrate for us some of the issues that
9 arose -- and we have --

10 MR. BERG: Your Honor, at this time we do
11 have the blackboard.

12 THE COURT: And that's fine. I just don't
13 understand the question -- or what the witness is being
14 asked to do.

15 BY MR. BERG:

16 Q. Did you have particular problems arriving at your
17 final drawings?

18 A. Yes.

19 Q. And could you describe, for instance, the first
20 issue that you had.

21 A. Well, first of all, the proportions had to be a
22 certain -- I didn't realize that, but it has to be a
23 certain size.

24 Q. Do you recall the size?

25 A. 750 milliliters.

1 Q. Did you go through a process to arrive at the
2 right size?

3 A. Yes.

4 MR. BERG: Your Honor, may Mr. Alexander
5 demonstrate that process on the blackboard?

6 THE COURT: Yes. Do you tend to ask him
7 questions while he is away from the mic or are you
8 asking that he conduct the drawing, return to the
9 witness box, and then you will ask additional questions?

10 BY MR. BERG:

11 Q. If it's possible -- he speaks loudly. If we
12 could him a couple questions while he's there and pick
13 up his voice, I would appreciate it -- while he's at the
14 blackboard?

15 THE COURT: Well, I did notice that this
16 morning apparently we do have a mic that's on a stand.
17 I don't know if the clerk intended to put that close to
18 him.

19 MR. BERG: Oh, that's great.

20 THE COURT: If we have that, then we may do
21 that.

22 But, yes, the witness may step down to
23 demonstrate as counsel has asked.

24 Now, the jury should understand what is
25 being placed on the board will not be an exhibit for

1 you. In other words, it is to aid the witness in his
2 testimony so that you can understand how he went about
3 creating the design.

4 THE COURT: Does the witness have in mind
5 the question that counsel wishes you to demonstrate?

6 THE WITNESS: I think I understand what he
7 is saying, Your Honor.

8 THE COURT: All right.

9 MR. BERG: Let me thank the Court for the
10 accomodation.

11 THE COURT: So the witness will just be
12 drawing on the board at this point; am I correct?

13 MR. BERG: Yes. I will have a question once
14 he starts drawing.

15 THE WITNESS: It will be very short.

16 THE COURT: So you don't have to worry about
17 testifying until counsel asks you another question.

18 THE WITNESS: I've never worked in a suit
19 before so it's a little...

20 BY MR. BERG:

21 Q. What is the first issue you are going to
22 demonstrate?

23 A. Proportion.

24 Q. Please show me.

25 A. So I am not technically --

1 Q. Close to the mic, please.

2 A. I'm not that technically skillful with computers
3 and computer graphics and stuff. So my training is just
4 as a draftsman.

5 And so I didn't -- I couldn't understand how to
6 make it 750 milliliters or whatever.

7 Q. So what did you do?

8 A. So I went to the liquor store near me. I know
9 someone who owns it. And he let me get about 25 or
10 30 -- I don't remember the number, I did it more than
11 once -- random bottles from around the store, like
12 Drambuie and Crown Royal and any bottle that was not
13 conventional, but just odd shaped. So I got a piece of
14 paper -- can you hear me?

15 Q. Yes, sir, I can.

16 A. I got a piece of paper, drawing paper. And I
17 then I put a line across here. And then I found the
18 middle of the paper and put a line there. And so --
19 well, maybe I should make it bigger. But this will
20 work.

21 So then I would put each bottle -- whatever the
22 shape of the bottle was -- on it. This would be a Crown
23 Royal, this would be Drambuie. I thought if I continued
24 to make these arbitrary lines, I traced around the
25 bottle with, let's say it is a Patron bottle. I traced

1 around it with a pencil, thin lines, until I got a
2 schematic -- not a schematic, but a web of all these
3 different shaped bottles in this. And within that, I
4 guess, how do you go -- how do you find the middle of
5 all that? So I just took a guess and tried to get the
6 exact middle. And in the middle of all that, like this,
7 became what I hoped was the proportions that we need.

8 Q. Did it turn out to be --

9 A. It turned out very close. What I did was I took
10 these drawings like that, proportionate. And then I
11 sent them to Toronto. And they -- Dan showed them to
12 people in the liquor business --

13 Q. Tell the jury what you mean when you said you
14 sent them to Toronto?

15 A. That's where we were putting -- trying to put our
16 business together.

17 Q. The intention at first was to put it together for
18 Canada or no?

19 A. Well, we -- because Dan is Canadian, and he is --
20 Patron business was in Toronto -- or in all of Canada.
21 And he felt that he had access to the liquor industry.
22 People who could advise. We were both very green when
23 we went into this. We didn't know what -- he knew. I
24 didn't know what I was doing.

25 Q. What was the next issue you dealt with, sir?

1 A. Well, the most problematic issue is the look, the
2 look of it. Because just a little bit of variation here
3 or there could change everything.

4 What I did was, as I said a minute ago -- I'll
5 try to make this brief -- I tried to make it look
6 appealing, something that people would look at and want.
7 So how do you to that? I mean, you don't want to -- you
8 want to make it something that's -- has some -- lack of
9 a better word, has a certain kind of feel to it. That's
10 what happens in the design.

11 And so I worked very hard on that, because here
12 was one of the biggest problems -- and doing a skull,
13 you can have a skull that's, you know, thin and flat or
14 round. Not every human skull is the same. And I wanted
15 to find one that worked to my liking.

16 And so I would do drawing after drawing, usually
17 like this. I would start off generally, I try to do it
18 big like this, in a very kind of abstract way.

19 And then -- and then I would begin to take that
20 part and then develop it, and make it into a much more
21 recognizable and so forth.

22 But each time I would do it, sometimes the eyes
23 would be smaller, sometimes the eyes would be bigger,
24 sometimes this went from here to here. They change
25 constantly. And it was a series of many, many of these.

1 And then Dan would come to my studio, and we would talk
2 to each other about, What do you think of this? What do
3 you think of that? Does that one work?

4 And then you have a problem that arose right off,
5 and that's this: How do you get the liquid out of the
6 vessel?

7 So --

8 Q. Let me ask you now, are you speaking of the spout
9 at this point?

10 A. Yes. I didn't really know at first. I thought,
11 Well, you could do it this way. The easiest way is for
12 me to hold the bottle like this and you put a thing like
13 this, tilt the bottle, pour it out. Or you could have
14 had a little hole, whatever.

15 And then we tried -- this was something I really
16 tried to work with, is having it like this.

17 Q. Was there any problem with that?

18 A. To me it looked like a chimney or something. It
19 just didn't look right.

20 So finally aesthetically, I came on the idea that
21 if you look at the side of the skull like this, this was
22 very important. Aesthetically, I thought it looked good
23 like this, at an angle coming out the back.

24 Then you get into the problem of what you do with
25 the proportion.

1 I'm sorry. I can actually draw better than this.

2 Q. Are you trying to sell your art, sir?

3 A. You make it this high and this wide or skinny.

4 So you may not notice it as much. Well, no. That
5 starts to look ridiculous and cheap.

6 So this proportion and the cap size and all that,
7 this all became appealing to me. With Dan's input, very
8 much so, we just -- "we," because it was now -- I'm the
9 artist. But it really was a collaborative effort
10 between Dan and myself. I sought his counsel and advice
11 all the way through it, every step almost.

12 Q. How did you resolve the spout problem? Is that
13 where the spout remained?

14 A. Yes.

15 THE COURT: Excuse me. Two questions. One
16 please.

17 BY MR. BERG:

18 Q. How did you resolve the problem?

19 A. It was just a look that we both thought was
20 appealing, from the side, the front, back. And that's
21 what we settled on.

22 Q. Perhaps you will have a seat.

23 A. And the width and the height and the angle.

24 Q. Were these anatomically correct skulls as
25 Mr. Hummel said?

1 A. No, they were not. If I wanted to do an
2 anatomically correct model, which is a real problem, I
3 would just go to art supply store or medical supply
4 store and get a plastic skull and make a mold of it. I
5 wanted it to be my original idea.

6 Q. And was it?

7 A. I'm very proud of it.

8 Q. Would you have a seat, sir.

9 A. Thank you for allowing me to do this.

10 Q. Could you sign your name to it and sell any of
11 that, sir?

12 A. No, not this seat.

13 That's called wishing.

14 Q. If I might ask -- or I will wait until --

15 MR. BERG: May I ask the deputy clerk,
16 Yolanda, would you please pass these bottles to
17 Mr. Alexander, No. 45.

18 If we could start there that would be
19 helpful. Just that one for now.

20 This is deemed admitted already, Your Honor,
21 I believe.

22 THE COURT: So I deemed admitted last night
23 all the exhibits that we discussed.

24 So is this marked as Exhibit 45?

25 MR. BERG: It is marked as Exhibit 45.

1 BY MR. BERG:

2 Q. Mr. Alexander, were you concerned or not about
3 how the bottle would come out?

4 A. How it looked when it was finished?

5 Q. Yes, sir.

6 A. Very, very much so. Because I knew that I had no
7 control over it in terms of the -- once it became a
8 liquid mold and fired in a kiln -- I'm a two-dimensional
9 artist. And I had to create the illusion of depth. I'm
10 not a sculptor.

11 So I was very worried what I found so likable
12 about my drawing and idea, would it translate to this?
13 I knew it wouldn't be the same. This is class and that
14 was charcoal. That was a flat, two-dimensional surface.
15 This is a three-dimensional surface and so forth. But I
16 was very pleased the way it turned out, yes. And I
17 signed off on it.

18 Q. What was it you signed off on?

19 A. The way it looked. I liked it very much.

20 Q. Do you know how the bottle or the drawings became
21 3D? How you went from your two-dimensional to your 3D
22 bottle?

23 A. Well, there was one point where I didn't. And I
24 was asked by Dan -- very difficult for me to do, but he
25 asked me if I would make a mold, make a model. And I

1 tried. But it was very difficult for me to get the
2 look.

3 And then we -- I was told that we can -- there is
4 computer graphics that can take flat, two-dimensional
5 work, it is called a schematic, and break them --
6 convert them into a three-dimensional shape.

7 Q. Were you capable of creating the schematics?

8 A. No. I have no knowledge in that world
9 whatsoever.

10 Q. Did you ever see -- tell the jury where the
11 bottle is made. What company makes the bottle?

12 A. The bottle is made by Bruni Glass. It is a
13 company out of Italy. I think the bottle is actually
14 made -- I may be wrong, but I think it's actually made
15 in Kosovo or somewhere. I don't know where it's exactly
16 made, where their factory is. I heard of that.

17 Q. Have you ever seen, either in person or
18 otherwise, or in video, have you ever seen the
19 production of the bottle?

20 A. I have seen video of it.

21 Q. When did you see video?

22 A. Very early on. We were sent a video from -- oh,
23 boy, the people in Toronto were sent a video of the
24 kiln, it's a big fiery -- red fiery furnace and had a
25 conveyor belt coming out of it.

1 The first bottle appeared was out in that intense
2 heat. And then as it came out of the furnace, it began
3 to smoke and turn gray. From orange to gray. And then
4 as it went down the conveyor belt, it became clearer and
5 clearer until it cooled. And then you saw it. It was
6 rather dramatic. That's the way I saw -- I saw that.

7 Q. What was your reaction to the end product as it
8 got to the end of the --

9 A. I was very pleased with it. But they also --
10 there was a lot of tweaking that went on, you know, in
11 terms of -- I'm sure with Bruni.

12 Once I got in the -- my job, I felt was done,
13 which was doing the drawings. And then I trusted Dan
14 and the people in Toronto to take care of it from there.
15 Because it is something that I felt comfortable that
16 they would do a good job with it. And they assured me
17 that the schematics would work.

18 Q. Now, I want to take you back if I can, and would
19 you explain to the jury what role or where -- strike
20 that.

21 Does the skull play a role in your paintings?

22 A. Well, it has off and on throughout my career.
23 When I was a small -- I mean, a young teenager, I used
24 to draw hot rods and, you know, things like that.

25 And I would draw skulls on the door. You know,

1 the skull's a very powerful image. And it's been used
2 throughout history and art, going back to antiquity.

3 And I know about the skull use in art, going all
4 the way back to ancient cave paintings even.

5 And occasionally throughout my career the skulls
6 have appeared in the landscape or in the scenes. It is
7 not primarily what I do. But I've used them throughout
8 my entire artistic life.

9 Q. Would you tell us what the basis is of your
10 knowledge of skulls, where you became familiar and so
11 on?

12 A. Well, I don't know in early stages where I became
13 familiar with it. But in reference to this vodka
14 bottle, I was -- I was in -- from the first idea -- I
15 think. It came into my consciousness many years
16 before -- as I've said, before I met Dan.

17 And I was in -- I was aware of the skulls being
18 used in the Day of the Dead celebration, because in
19 Texas, it's much more -- you see it much more than you
20 do in other parts of the country. I'm sure it's true
21 here in Southern California too.

22 And I remember going many years ago to
23 the -- this very emotionally moving festival in Oaxaca,
24 Mexico for the Day of the Dead, which is held every
25 year. It's one of the most popular in Mexico.

1 Q. Why did you go to Oaxaca?

2 A. I wanted to see the Day of the Dead celebration
3 in Mexico in its entirety, as opposed to just seeing the
4 little alters that you see around in stores and things
5 you'd see. It was very common to see the displays with
6 the skulls and the candy and the flowers, et cetera.

7 But the one in Oaxaca was particularly powerful.
8 And being an artist who is interested in that kind of
9 stuff, imagery, to see that -- the entire totality of
10 the those festivals, where the parades and music and the
11 grave yards decorated with mounds of flowers and candles
12 at night and the families are there. There's a great
13 spirituality and a power to that.

14 As an artist, it's hard for it not to have a
15 profound effect on you. And also, though, you would see
16 these skulls, little skulls as candies and cookies and
17 so forth. And then you would -- even when I was
18 younger, you'd see that during the Day of the Dead
19 celebration, which is a completely different thing than
20 going and seeing it in Mexico, though, where you see the
21 drama of the entire thing.

22 Q. Have you traveled to Mexico often?

23 A. Yes.

24 Q. And have you seen -- can you tell us any other
25 images you might have seen there, maybe other painters

1 and so on?

2 A. I always have been influenced by other painters
3 in my work. And I had a great fascination early on, all
4 through my career, of the Mexican muralists; from early
5 day Cordero. And then also of course the great
6 Fruticola. And great European painters often used
7 skulls, so I -- being a deep admirer of the history of
8 art, I was conscious and aware of the use of skulls in
9 painting throughout my entire adult career.

10 Q. I would like to do now is ask Ms. Skipper to
11 perhaps bring the entire box. I will read each exhibit.

12 Exhibit 772, KAH Blanco. 58, which is Extra
13 Anejo. 57 is KAH Anejo. 56 is Diablo.

14 THE COURT: Would you like to have the
15 exhibits placed before the witness?

16 MR. BERG: Yes, I --

17 And you would like to have the witness have
18 them all at the same time or individually?

19 MR. BERG: Let's just start with two of
20 them. That would be 772. Just that one would be fine
21 for now.

22 THE COURT: So the clerk will place before
23 the witness Exhibit 772. So these exhibits are in
24 evidence. And so this is an example of something that
25 the jurors will actually have in the jury room during

1 deliberations so that you can examine them more closely.

2 772 is before the witness.

3 BY MR. BERG:

4 Q. Mr. Alexander, do you recognize Exhibit 772 to
5 your right?

6 A. Yes.

7 Q. What is that?

8 A. It's a KAH tequila bottle.

9 Q. What is your reaction? How do you feel when you
10 see that bottle?

11 A. I feel that I was ripped off.

12 Q. Can you tell us what you see about that bottle,
13 if anything, that makes you feel that way?

14 A. Well, you have to understand that for
15 something -- I like the KAH bottle. You have to
16 understand that there has to be a feeling to something.
17 It is the essence of it. It is not -- you can break
18 things down to every little centimeter and this one's
19 got a little shape here and this one doesn't. But the
20 truth is to me, when I first saw it, the first time I
21 saw it, Jonathan Hemi showed it to me.

22 Q. Who's Jonathan Hemi?

23 A. He works with our company. He runs the company
24 in Toronto.

25 And I went, Whoa. I mean, I thought, that's

1 really -- that's really rattling. So it's the look.
2 It's not the detail. It's the essence of what something
3 looks like.

4 And I know that this is hard to visualize, but if
5 you -- it is very clear in this room, when you are in a
6 courtroom like this with strangers and all the focus in
7 the world is on these bottles, and it is brightly lit,
8 and you've never seen them, it's shocking.

9 And the differences you pick up. These eyes are
10 painted dark. These are not.

11 But in the context, if you -- which I have to
12 think about and worry about in marketing this, this is
13 not where the tequila are seen -- or these bottles.
14 They are not seen in courtrooms. They are seen in
15 liquor stores -- I mean, in liquor stores, around lots
16 of other liquor and crowded things, where there's
17 liquor, liquor, liquor this, and liquor that. There's
18 easy confusion. You see them very often, both products,
19 in bars, dimly lit bar lighting, on a shelf behind the
20 bar. And I have -- I have been in many bars and looked
21 at the shelf from a distance and though, is that my --
22 and I don't have the greatest eyesight, but is that my
23 bottle or is that their bottle? I mean, they are
24 extremely confusing in those context.

25 And in restaurants -- you see a lot restaurants

1 have them. And it's -- the essence of what they look
2 like from a distance. Sitting here like this picking
3 them apart --

4 THE COURT: Excuse me for a moment. The
5 witness may be beyond the scope of the question.
6 Counsel may want to ask another question.

7 THE WITNESS: Sorry.

8 MR. BERG: Yes, of course.

9 BY MR. BERG:

10 Q. What in particular is similar -- pardon me.
11 Could I get some water, please.

12 What do you see that's similar between the two,
13 sir?

14 A. Well, do you want me to go into point by point?

15 Q. Yes. That will be fine. I'll walk you through
16 it.

17 Tell us first what you see that's similar.

18 A. From here, if you look at the two like that, it
19 is -- it's this subtle curvature of the bottom of the
20 chin in both is to me almost identical.

21 The feeling, even though ours has teeth that are
22 three dimensional -- these teeth, which are basically in
23 the same configuration and about the same proportion
24 from top to bottom, they are not that way. But there is
25 an illusion that was created by the person who painted

1 this, using these shadows and highlights along there,
2 that the teeth are three dimensional.

3 There is a clear feeling that -- and then on
4 other bottles it's more pronounced. But the mouths to
5 me are very, very troubling. And then the nose and the
6 proportions of the nose are shockingly similar to me.
7 And then the sockets of the eyes are almost the same
8 size. And then the shape of the head here and the feel
9 of the head from this -- from this to this shockingly
10 alike.

11 And then you get on up to the top. And the two
12 are almost identical. There's a slight difference. But
13 as I said, in context where you are seeing it at a
14 liquor store or in a bar, restaurant, in a lighted bar,
15 it's very -- the feeling is almost identical. You
16 think, Oh, that's -- and then as you -- in a courtroom,
17 a sterile condition where it shouldn't even be, of
18 course you can break it down.

19 But when you're walking through a bar with your
20 mate or your friends and you look up on the bar and you
21 say, Oh, look that's Dan Aykroyd's or my product.

22 Q. You have witnessed this personally?

23 A. Many, many, many times.

24 Q. Have you visited liquor stores where you saw the
25 bottles?

1 A. Hundreds.

2 Q. What is it that you saw?

3 A. Well, I've seen -- early on. We are talking
4 about when KAH first came out.

5 Q. Do you remember the date when it first came out?

6 A. I heard it earlier, but I forgot.

7 Q. Would you accept November, December of 2010, sir?

8 MR. RAFFERTY: Objection.

9 THE COURT: Objection sustained.

10 Counsel's question will be stricken.

11 The witness is admonished not to answer the
12 question.

13 Counsel may ask another.

14 BY MR. BERG:

15 Q. Did the KAH bottle come out after Crystal Head
16 Vodka came out?

17 A. Yes.

18 Q. Do you have any idea how long after?

19 A. Couple of years.

20 Q. Now, if I could ask Ms. Skipper to bring up
21 Mr. Alexander 58.

22 THE COURT: And should the clerk remove the
23 two that are on the stand now or one of them?

24 MR. BERG: If there's room there, I would
25 like to leave them there, Your Honor.

1 THE COURT: Exhibit 58 will be placed before
2 the witness.

3 BY MR. BERG:

4 Q. Have you ever seen 58 before?

5 A. No.

6 Q. What do you notice about that bottle, sir?

7 A. Well, I -- well, there is -- again, in the
8 painting and the rendering of it, there are many things
9 that create illusion of similarity.

10 But I'm struck by the use of these crystal-like
11 shiny objects that are attached to it, that reflect
12 light.

13 One of the key things in our marketing early on
14 when we were advertising, we used to say that our
15 product is filtered through Herkimer diamonds. It's a
16 form of crystal that grows out of the ground that we use
17 to filter it. That was part of our advertising
18 campaign. The crystal, the filtration through the
19 quartz, the crystal quartz.

20 And there's just a -- kind of -- if you look at
21 ours -- and this is not painted, clearly, and this one
22 is, this reflects light and it makes it sparkle in
23 certain kinds of light, especially on bars. And there
24 is a sparkly quality to this that I'd actually never
25 seen, more so than this. It's got kind a shimmer to it,

1 much like hours.

2 Q. And the shimmer comes from what, sir?

3 A. The little crystal-like things like put on it.

4 Q. And what is the name of your vodka?

5 A. Crystal Head.

6 Q. Do you remember about when Crystal Head came out?

7 A. 2006, I think.

8 Q. Math was not your major, I take it?

9 A. No. I apologize to the Court. But I'm really
10 not good at that.

11 Q. Do you recall that it did come out?

12 A. Yes.

13 Q. You mentioned the marketing -- part of the
14 marketing involved the crystals; is that correct, sir?

15 A. Yes.

16 Q. Do you know the marketing that was used by KAH
17 Tequila?

18 A. Not, not able to articulate that, no.

19 Q. Does KAH Tequila celebrate Day of the Dead?

20 A. Yes.

21 Q. And is it your intention to demean Day of the
22 Dead in any way?

23 A. Absolutely not. I'm far from it.

24 Q. When you first went out with Dan -- excuse me.
25 When the bottle first came out, did you

1 personally get involved in the marketing?

2 A. Yes.

3 Q. In what way?

4 A. When we first started the idea of what we were
5 going to do, we had committed to the distillery I think
6 5,000 cases. Again, my math can be off.

7 But we originally -- this was much better for Dan
8 or Jonathan, but this is what I was told. We were
9 going --

10 THE COURT: Well, wait just a moment.

11 So if the witness isn't testifying from his
12 own personal knowledge but what someone told him, it
13 might be better if we leave that inquiry to somebody
14 else.

15 MR. BERG: Yes, Your Honor. But these
16 are -- of course.

17 THE COURT: Well, it could go to some other
18 issue in the case.

19 But it's just the way he started his answer,
20 Well, this is what I was told. So maybe Counsel wants
21 to ask him a question.

22 MR. BERG: I can cure that.

23 BY MR. BERG:

24 Q. Tell us what you did to help market the bottle.

25 A. We got a large truck, a large truck painted

1 black. And we put -- it's very large. It had a couch
2 inside, and a -- like the size of a bus, small bus. And
3 we painted huge crystal heads around the bus, the sides
4 and back and front and on the door. And Dan called it
5 the Crystal Head Mobile. And we launched the product in
6 Miami, Orlando, New Orleans, Houston, Dallas, Las Vegas.

7 The reason we did that is because -- odd group of
8 cities. But we -- Dan believed that -- there was a
9 House of Blues in each of those cities, and that we
10 could use the House of Blues as a place to have launch
11 parties. So we launched it literally city by city. We
12 started there.

13 Q. Mr. Alexander, would you explain to the jury
14 what, if any, relationship Mr. Aykroyd has to the House
15 of Blues?

16 A. Yes. He has been involved with the business for
17 -- since its beginning.

18 Q. Was he a founder of it, do you know?

19 A. Yes.

20 Q. Okay. Go ahead.

21 A. So we went to each city, and what we did in each
22 city, starting in Florida is we, as a company, we
23 invited the major bartenders, major restaurant owners,
24 chefs, liquor people from the region, and we would have
25 these big parties at these House of Blues. And we would

1 invite everybody to it.

2 And large -- because of Dan's celebrity, huge
3 crowds would come. And we would have this Crystal Head
4 night. And we would serve food. And Dan would get up
5 at each one and make a presentation. And then he would
6 stay until well into the morning at each venue signing
7 autographs and photographs and signing bottles.

8 And that started. By the time we got through
9 that tour, we pretty much got the -- the product was
10 pretty much gone. We had to go back to the drawing --
11 nobody possibly could have imagined this thing would
12 take off like it did. It just went from here to there.

13 So we got more product, and then --

14 Q. Let me ask you, sir, was there any other sort of
15 press -- or, excuse me. Was there any sort of marketing
16 other than when you described as Dan and you or Dan
17 alone went from city to city that you know of
18 personally?

19 A. Yes. He would be on the radio, on the cell phone
20 from city to city talking to radio stations. And every
21 city we went to there would be people from NBC, ABC,
22 CBS, newspapers. They would all come to these events.
23 So they became happenings. It was like, every city we
24 went to, even small cities we would go -- and stop at
25 mom and pop liquor stores. We would go from little

1 liquor stores owned by someone in small town to Costco
2 and Walmarts and everything in between. And we
3 literally crisscrossed the country and Canada in this
4 truck over a period of time and marketed it in that way.

5 And then he would go around -- when we were in
6 any particular city, we would go around through the
7 night and we would go bar to bar. Like it was -- it was
8 kind of bizarre. Here we are, we just show up at bars.
9 And it was fun, to say the least. The tour.

10 The first one was. As the years went on, it got
11 more tedious. But that first -- I remember that first
12 year. It was one of the most fun things.

13 And that's how we built the business, on the back
14 of his celebrity and enticing people into these places
15 to -- for him to sign autographs. I personally have
16 seen him sign tens of thousands of bottles, literally.

17 We would go into a city, just pick a city,
18 Phoenix, Arizona, and then at a signing at a big liquor
19 chain or at a Costco or Walmart, and there would be a
20 thousand people waiting in line and waiting there for
21 five hours to get in so he could sign the bottle for
22 them.

23 And he never faltered. He signed every bottle.
24 And every person there got one. And it was -- that is
25 the way that Crystal Head Vodka became the iconic brand

1 that it became. And the nature of the uniqueness of
2 skull-shaped bottle as a vessel for the alcohol.

3 MR. BERG: May we take a very brief break,
4 Your Honor?

5 THE COURT: May we go off the record or
6 leave the courtroom?

7 MR. BERG: I would like very much to leave
8 the courtroom.

9 THE COURT: You may do so.

10 We are going to take a break at this time.
11 This is not a time that we would be breaking. But if
12 counsel needs to break early, we can do that.

13 MR. BERG: I don't want to do that to
14 everyone. I can fight my way through it.

15 THE COURT: All right. You can just step
16 out if you wish to.

17 MR. BERG: It's embarrassing. Well, I'm 75.
18 I'm going.

19 (RECESS.)

20 THE COURT: We are back on the record.
21 Counsel may continue.

22 MR. BERG: Let me express my gratitude, Your
23 Honor. Thank you.

24 BY MR. BERG:

25 Q. I would like to go back and revisit one issue you

1 mentioned, sir.

2 Would you pick up your bottle. Would you talk
3 about the spout for just a moment. You mentioned in
4 passing --

5 THE COURT: Excuse me for a moment. So what
6 is the question?

7 BY MR. BERG:

8 Q. Tell us about the problems with the spout, if you
9 will.

10 A. Well, one of the problems we encountered very
11 quickly was -- and the assembly lines to fill the
12 bottle, if you have the spout straight up, it goes down
13 the thing, and it can be done on an assembly line like a
14 conventional bottle, all bottles are like that.

15 Once we discovered -- once it was made in that
16 angle, the distillery put the alcohol -- the vodka into
17 the bottle, they had to do it by hand. So each bottle
18 had to be hand-filled. Very, very problematic in terms
19 of mass producing the bottles and getting the kind of
20 quantity we would need.

21 So after a while, what we did is we invested a
22 lot of money to have a special machine made that would
23 fill the bottles like this. At that angle it was very
24 problematic to get the fluid into the thing. So that
25 was one.

1 Q. Do you know much money the company spent on that?

2 A. You would have to ask Jonathan or Dan.

3 Q. No problem.

4 Have you seen other bottles with the spout --
5 other than KAH Tequila, with a spout at an angle like
6 that?

7 A. No.

8 Q. I have --

9 MR. BERG: I'm going to conclude now, Your
10 Honor. But I want to ask Mr. Alexander to walk us
11 through a previously admitted exhibit, No. 124.
12 Plaintiff Exhibit 124.

13 THE COURT: 124 is actually on the monitors.
14 So for the jurors, you are able to see it. The witness
15 may use that as well. If you are not able to see it
16 well enough to answer the question that counsel asks,
17 I'm sure another exhibit can be provided.

18 Counsel may proceed.

19 BY MR. BERG:

20 Q. Are you familiar this exhibit, sir?

21 A. Yes.

22 Q. And what is this?

23 A. This is one of the many drawings that I did for
24 the preparation of the skull.

25 Q. Can you describe this as an early or late

1 drawing?

2 A. Later. Much later.

3 Q. Let's keep going. Next one. And the same
4 question?

5 A. Later.

6 THE COURT: What is the exhibit number, for
7 the record, please?

8 MR. BERG: This is 174 -- excuse me, 124.
9 My math is not so good either.

10 THE COURT:

11 You may continue.

12 BY MR. BERG:

13 Q. Next. Early or late, sir?

14 A. Hard to say on that one. It looks like it is
15 later though.

16 THE COURT: This is also a part of 124?

17 MR. BERG: Yes, it is Your Honor.

18 THE COURT: All right.

19 BY MR. BERG:

20 Q. Next. Early or late?

21 A. That -- these look like nearly the same time
22 frame.

23 Q. Next.

24 And do you have -- this also, sir, early or late?

25 A. Later.

1 Q. So my question --

2 A. Much later.

3 Q. -- is what percentage of these drawings of yours
4 do these sketches represent?

5 A. This?

6 Q. Yes.

7 A. In the total number?

8 Q. Yes.

9 A. Less than one percent.

10 Q. Do you have any estimate of how many sketches you
11 did of the skull before it became finalized?

12 A. Sketches? Certainly over a hundred.

13 Q. And who's Walter Hyde, if you'll tell us?

14 A. He was a friend of Dan's that lived in Kingston,
15 Ontario.

16 Q. And what role did he have --

17 MR. BERG: Pardon me. You can take that
18 down now, please.

19 BY MR. BERG:

20 Q. What role did he have, if any, in bringing the
21 bottle to market?

22 A. Well, when I would do drawings, I would send them
23 to Toronto. And then when we realized that the way that
24 this was going to be made into three-dimensional form
25 was through the schematics, Walter helped with that.

1 And also Walter, when we were going back and
2 forth about the neck, he offered input, as Dan did. As
3 I said, it was a real collaborative as to design. One
4 was hexagon, one was round. One was -- pardon me. One
5 was skinnier.

6 And Walter's role in this was simply giving
7 input into how the neck was -- how to solve the neck
8 problem.

9 Q. Is Walter still around?

10 A. Tragically, no. Walter died shortly after that
11 of an illness.

12 Q. In addition -- you've mentioned Jonathan Hemi,
13 and Dan, of course.

14 Who else has been involved in the making of this
15 business?

16 A. The business -- not the design?

17 Q. Not the design, the business end.

18 A. Well, the primary person is clearly Dan. But
19 Jonathan Hemi is very, very, very instrumental, in fact,
20 he runs the company.

21 And early in the business, very early, there was
22 a man by the name of Andrew Stoddard who was a liquor
23 person in Toronto. And he is was involved in the
24 company early on. But he was not there about a year, if
25 I can remember correctly.

1 Q. Who is Davey Brown?

2 A. Oh, I'm sorry. Davey Brown, who will be here
3 tomorrow, I think. He is another partner. And is very
4 involved with the company. He was a postman in Toronto.
5 And he came to work with us to help do logistical stuff
6 and marketing stuff. And he worked in the office with
7 Jonathan. He also -- it's coming back clear to me.

8 Davey was -- in the early stages was involved
9 when we were trying to set up social media and answer
10 mail, internet mail. And Danny -- I mean, Jonathan was
11 our liaison -- Davey Brown was our liaison to do all
12 that kind of work. I didn't have the expertise, to say
13 the least, nor did I have the time.

14 I resumed after these drawings left. And then --
15 with the exception of when we were on tour, I was very
16 much back involved in my painting career. In fact,
17 right in the middle of all that I was putting a show
18 together for a retrospective at the Smithsonian. It was
19 very problematic for me to put the time in like Dan and
20 Jonathan and Davey did, because of my other problems.

21 Q. Did you neglect your art career when you were
22 promoting this?

23 A. Very, very much so. For at least a year and a
24 half.

25 Q. What about Danny and his movie career?

1 THE COURT: What's the question?

2 BY MR. BERG:

3 Q. Did Danny also neglect his movie career during
4 that time?

5 MR. RAFFERTY: Your Honor, I object.

6 THE COURT: Sustained.

7 THE WITNESS: Oh.

8 MR. BERG: You can't answer.

9 THE COURT: You don't answer it.

10 Counsel will ask another question.

11 BY MR. BERG:

12 Q. Anyone else involved with Davey at the company?

13 A. We had employees. A person who became very much
14 involved in the company, and to this day does, is
15 Davey's, well, wife, mate, Martha. And she was ran the
16 point of sale stuff, the -- you know, T-shirts,
17 marketing. She was involved in that. Very, very much
18 instrumental in everything, to say the least.

19 Q. Is it a small company in terms of employees?

20 A. Yes.

21 Q. And do you have any idea how many employees there
22 are?

23 A. Not counting the distributor types, but in our
24 office --

25 Q. In your business, yes.

1 A. I'd say under -- maybe a dozen or less. I'm not
2 really sure.

3 Q. Who is Martha Mendoza?

4 A. She is -- as I just said, she is in charge of
5 point of sale and marketing and ordering product, and
6 communicating with people who were going -- if you were
7 going to do a -- what do you call it -- a shaker, let's
8 say, a Crystal Head shaker for ice or whatever with the
9 Crystal Head logo on it, she was instrumental in helping
10 design some of those things, and helping product
11 placement. Those types of things. Marketing stuff.

12 Q. In how many countries is Crystal Head sold? Or
13 at least would you name some of the countries.

14 A. Well, it's certainly sold globally. We are in --
15 I may be wrong on the number, but I think we have trade
16 dress in 70 countries, including the Far East. We
17 have England, France, Germany, Scandinavia, South
18 America. We are scattered around many parts of the
19 world.

20 MR. BERG: Your Honor, I think I best
21 approach before I ask the next question. I may be
22 trespassing on a --

23 THE COURT: Maybe you can confer with
24 counsel off the record and avoid the approach.

25 (COUNSEL CONFER.)

1 MR. BERG: Your Honor, I think we need to
2 confer with the Court.

3 THE COURT: If it is one of the motions in
4 limine in issue, I don't have those before me. So could
5 you identify which motion it is for purposes of this
6 discussion.

7 MR. BERG: Your Honor, I received a ruling.
8 My associates and partners told me, no, I can't do that.

9 THE COURT: All right. Counsel may proceed.

10 BY MR. BERG:

11 Q. Mr. Alexander, I think that's all the questions I
12 have for you.

13 I pass the witness.

14 THE COURT: Thank you.

15 Cross-examination?

16 MR. RAFFERTY: With the Court's permission.

17

18 **CROSS-EXAMINATION**

19 BY MR. RAFFERTY:

20 Q. Good morning, Mr. Alexander.

21 A. Good morning.

22 Q. Again, I'm Tom Rafferty, and I think we met
23 yesterday.

24 A. Yes, we did.

25 Q. Mr. Alexander, you, in fact, have been painting

1 and drawing skulls from at least the early '70s?

2 A. Yes.

3 Q. And part of what you've done professionally is
4 paintings that include imagery of skulls?

5 A. Yes.

6 Q. Some of your works that are in the various
7 museums around the country are filled with skulls,
8 aren't they?

9 A. Various forms of skulls, some of them, yes.

10 Q. Some of them have many multiple skulls?

11 THE COURT: Some of the museums?

12 BY MR. RAFFERTY:

13 Q. Some of the pieces in the museums?

14 A. Yes.

15 Q. The individual pieces with multiple skulls.

16 A. Yes.

17 Q. And in fact some of the skulls in your paintings
18 that are hung in museums around the country have skulls
19 not only of humans but also of simeons (phonetic)?

20 A. And other forms, yes, other animals.

21 Q. And I think you -- I just want to be sure I
22 understood your testimony, every human skull is
23 different, isn't it?

24 A. Certainly.

25 Q. And so if you paint one person's skull and you

1 paint somebody else's skull, there are going to be
2 differences?

3 A. Yes.

4 Q. And the skulls that are in your paintings that
5 are hung in museums around the country, are they the
6 same skull or different skulls?

7 A. I would say that they are, what I would call
8 stylized. There's is no attempt in those to make it
9 photographically. They're an impression of things. I
10 don't paint -- I'm not a realist painter. So I if
11 paint -- if I was asked to paint your portrait, it would
12 be a struggle for me. I could do my interpretation of
13 that and make it -- try to make it appealing to an
14 audience. But I -- the skulls I use in my paintings --
15 or have used in my paintings, there's no attempt there
16 to make them look like realistic photographic skulls.
17 So, yes, they are all different types.

18 Q. Okay. And somebody could look at them and you
19 can discern differences between them?

20 A. The different skulls?

21 Q. Yes.

22 A. Yes, for sure.

23 Q. When you were creating the Crystal Head Vodka
24 bottle, the skull that's used in that bottle, you were
25 also trying to do something that was art and not simply

1 photography?

2 A. Yes, well. But -- yes, that is correct.

3 Q. And so that's not really any particular skull,
4 that's your stylized impression of the skull?

5 A. Yes.

6 Q. Do you think that that is an abstract and
7 stylized impression?

8 A. It is -- it's certainly based on the human skull,
9 but it is not a replica of the human skull.

10 Q. And the skulls in your paintings, you talked on
11 your direct testimony about the essence of a skull or
12 the feeling of a skull.

13 Do the skulls in your painting, despite their
14 variation, all have the essence of a skull in your
15 judgment?

16 A. No.

17 Q. Some do, some don't?

18 A. Yes, that would be accurate.

19 Q. Now, you said that little variations can change
20 things altogether?

21 A. Uh-huh.

22 Q. So variations in the skulls of your paintings can
23 change the impression that one gets?

24 A. In the paintings?

25 Q. Yes.

1 A. Yes.

2 Q. Now, how long did it take you to go from the idea
3 that you testified you had with Mr. Aykroyd to the
4 process where the people were making schematics of your
5 drawings in order to create the molds to make the glass
6 bottles?

7 A. That was over a year.

8 Q. Are you sure about that, sir?

9 A. No. I'm very -- unfortunately I'm not good with
10 dates.

11 Q. Do you recall ever testifying that the process
12 took about six months?

13 A. I -- you mean the process of me drawing them?

14 Q. Yes.

15 A. That could be accurate.

16 Q. So you are not sure as you sit here today how
17 long you spent working on this?

18 A. I spent working on the back and forth on this
19 from the beginning concept all the way up until the
20 final drawings were sent off. And, you know, I'd work
21 on them two or three days in a row or one day an all day
22 or one afternoon, then days would go by, we would -- I
23 would ship stuff to them for feedback. It was an
24 organic type of process where everybody was --
25 everybody -- Dan and myself were involved in that. And

1 it was a big chunk of time.

2 Q. Over what period of time, can you remember?

3 A. It was certainly a part of the year.

4 Q. But you don't know what part of the year? Could
5 have been half a year, three quarters of a year?

6 A. No. That doesn't come to my consciousness.

7 Q. Now, you also mentioned that you are not
8 particularly good in your own judgment at sculpting?

9 A. Sculpting?

10 Q. Yes, sculpting.

11 A. Well, I don't make sculpture. It's not a thing
12 that I do. I would not call myself a sculptor.

13 Q. In connection with the development of the Crystal
14 Head Vodka bottle, you did make a sculpture?

15 A. I made a clay sculpture, yes.

16 Q. How long did it take you to make that sculpture?

17 A. I don't know. It took weeks, you know, couple
18 weeks, three weeks. I don't remember. But it was a
19 very clumsy attempt. It was very problematic for me.

20 Q. But Mr. Aykroyd asked you to do that and you did
21 it?

22 A. Yes.

23 Q. In your judgment -- and I don't know very much
24 about art -- does it take more or less time to do a
25 drawing than a sculpture?

1 A. Well, I mean, a drawing can be made in minutes.
2 But to get a drawing the way you want it to look
3 sometimes can take a day.

4 I can work on a drawing for days on end before it
5 is finished. It is -- it's difficult to set a time
6 limit on it, because each drawing is different.

7 Q. And when you were -- when you were doing the
8 drawings that ultimately led to the creation of the
9 Crystal Head Vodka bottle, you were trying to -- you
10 were doing trial and error. You got some you didn't
11 like, some you liked?

12 A. Oh, yes. The beginning ones morphed into
13 something else. They changed. I had an idea for this
14 as a concept. But I hadn't -- I did not understand
15 visually exactly how I wanted it to look. This became
16 part of a process. Trial and error, let's say.

17 Q. You actually had this idea many, many years
18 before you spoke to Mr. Aykroyd about it?

19 A. Yes. Several years before.

20 Q. You, in fact, offered it to another one of your
21 friends?

22 A. Briefly.

23 Q. Was that friend Jimmy Buffet?

24 A. Yes.

25 Q. Mr. Buffet was going to put tequila --

1 A. When I mentioned it to him, it dismissed
2 immediately. He had no interest in it whatsoever. I
3 knew that he -- we talked about him going into the
4 tequila business. I said, I have an idea, why don't you
5 make a skull-shaped bottle. And he went (indicating),
6 and he just dismissed it. That was the last I brought
7 it up.

8 Q. Let's met shift a little bit and ask you some
9 questions about -- what you mentioned, the proportion,
10 when you were drawing on the board.

11 Now, the drawings on the board, those are sort of
12 like the drawings, although having -- being done under
13 pressure with a lot of people watching you, the same as
14 the ones in Exhibit 124?

15 A. Yeah. Well, they are the same approach to
16 drawing, yes.

17 Q. Exhibit 124 looks like a collection of pages from
18 a sketch book?

19 A. Yes.

20 Q. And how many -- did you keep one sketch book for
21 this project?

22 A. No. There were many more. They weren't always
23 sketch books because I work -- they're sketch book pages
24 or pieces of paper. I work on a wall. I don't work
25 sitting down.

1 Q. What was the approximate size of these when they
2 were in their original form?

3 Were they 8-by-12s?

4 A. I was going to say 14, 11-by-14. Some larger.

5 Q. Did you ever do a very large rendering of the
6 Crystal Head Vodka bottle?

7 A. Not that I remember, no.

8 Q. Okay. You talked a lot about getting the
9 proportion right. One of the ways you went to get the
10 proportion rights, you went out and acquired a whole
11 bunch of liquor bottles of varying sorts?

12 A. Yes.

13 Q. And, in fact, if we turn through Exhibit 124, I
14 think there are some of sketches that you -- I think you
15 replicated a little bit.

16 MR. RAFFERTY: And, Your Honor, I'm looking
17 at --

18 THE COURT: There are numbers at the bottom.
19 Two sets of numbers.

20 MR. RAFFERTY: Right. Thank you, Your
21 Honor.

22 I was going to take us to page -- to page
23 ending in No. 7938.

24 THE COURT: Sir, see if you can find that.

25 MR. RAFFERTY: It is coming up on the

1 screen, Your Honor?

2 THE COURT: Counsel is placing it on the
3 screen.

4 THE WITNESS: Yes.

5 BY MR. RAFFERTY:

6 Q. These are your sketches?

7 A. Yeah. But it -- oh, I see it.

8 Q. And it seems to say -- if I can read it. I
9 really can't read the second one. But it's the -- the
10 first bottle -- or the first word on the right-hand side
11 is Patron?

12 A. Yes.

13 Q. Then I can't read the second one. Do you know
14 what that --

15 A. Herradura, Don Julio, Crown Royal, Gin -- they
16 are just liquor names.

17 Q. These are the bottles of different kinds of
18 alcohol you used to help you --

19 A. Yes.

20 Q. -- to create your bottle here?

21 A. Yes.

22 THE COURT: I will just advise the witness,
23 let counsel complete his question before you start to
24 answer.

25 THE WITNESS: Sorry, Your Honor.

1 THE COURT: All right. Counsel.

2 MR. RAFFERTY: Thank you, Your Honor.

3 BY MR. RAFFERTY:

4 Q. Mr. Alexander, you talked about the problem with
5 placing the neck, I think you called it. The spout is
6 what I would call it. And I think you said one place to
7 put the spout in the skull was at the back.

8 But you couldn't fill that bottle, could you?

9 A. No. I was complete novice in terms of the -- the
10 technical aspects and the mechanics of it. Mine was
11 just an idea, and I was trying to figure out how to make
12 the idea work in terms of its visual impact.

13 And in the very beginning I had no idea, in the
14 early stages, what was going to happen with that.

15 Q. But every one of the bottles, I'll suggest to
16 you, and you can page through this if you want to, this
17 next page has got some more of your sketching.

18 Every bottle that you looked at had the spout on
19 top, didn't they?

20 A. Yes.

21 Q. Okay. So then I --

22 A. I'm sorry.

23 Q. No, no. I shouldn't cut you off.

24 A. Well, just from a practical standpoint, it would
25 make sense that the bottle would have this top like a

1 conventional bottle sticking straight up.

2 Q. In fact, from a practical standpoint, there is no
3 other option, is there?

4 A. Yes. We have another option.

5 Q. Well, you have -- it's still on the top. It's at
6 an angle?

7 A. Yes. But it is the angle.

8 Q. But it's on the top. And every other bottle we
9 looked at the spout was on the top?

10 A. On the top.

11 Q. If you could turn those three bottles you have
12 there sideways so you can look at the exhibits. The
13 spouts on this bottle at the same angle?

14 A. They are not at exactly the same angle. But they
15 are very close.

16 Q. Different angles, aren't they? You can see that
17 by just looking at it?

18 THE COURT: Wait just a moment. Did the
19 witness answer?

20 They are different angles, aren't they?

21 THE WITNESS: Slightly different.

22 BY MR. RAFFERTY:

23 Q. The slight difference can be discerned by just
24 looking at it, can't it?

25 A. Not if you just glance at it. If you sat here

1 like this and you're focused on that angle, which we are
2 doing in a court of law, yes, you can find that there is
3 a difference. If it's on a shelf at a bar in a club,
4 you don't notice that at all. It's an angle -- that was
5 something particularly troubling to me when I saw the
6 KAH bottle, that -- it just seemed to me like it looked
7 like my bottle.

8 Q. Now, I just want to ask you -- you have
9 Exhibit 58 which is the Extra Anejo, the black bottle
10 that's in front of you.

11 A. Yes.

12 Q. You said -- I'm not going to put words in your
13 mouth, but you mentioned the fact that the crystals that
14 are embedded in it are reflective?

15 A. Uh-huh.

16 Q. You also said you visited hundreds of liquor
17 stores and bars during this tour across the country in
18 the truck.

19 A. Well --

20 THE COURT: Wait just a moment. There's no
21 question.

22 MR. RAFFERTY: I'm in an awkward spot, Your
23 Honor. I don't want to talk over the witness.

24 THE COURT: Well it might be better to just
25 state a question than counsel saying -- trying to

1 interpret what the witness said.

2 BY MR. RAFFERTY:

3 Q. In any of those visits, did you see that bottle?

4 A. The KAH bottle?

5 Q. The bottle with the crystal sparkle?

6 A. No.

7 Q. You never noticed it any of those visits?

8 A. No.

9 Q. So when you -- so today you said you hadn't seen
10 it before, but you're taken aback by the fact that it
11 sparkles.

12 A. The first time I saw this bottle is today.

13 Q. So in all those hundreds and hundreds of visits,
14 you never saw it before?

15 A. Well, to be accurate, in all the -- in that
16 period of time we are talking about, KAH Tequila didn't
17 exist.

18 Q. Have you seen it in a liquor store or bar between
19 the time that KAH came into the market or that bottle
20 came onto the market until today?

21 A. No, I have not seen that bottle until today.

22 Q. Even though it is sparkly and shiny?

23 A. Yes.

24 Q. Do you think you'd noticed it if you saw it in a
25 brightly lit liquor store?

1 A. I would notice it as KAH bottle?

2 Q. Uh-huh.

3 A. Sure. It's look like a KAH bottle to me.

4 Q. You tell -- when you look at the KAH bottles, you
5 can tell that they're KAH bottles?

6 A. That's the appearance that I get, yes.

7 Q. Okay.

8 A. Maybe somebody's copied KAH.

9 Q. Now, you have an ownership interest in Globefill?

10 A. Yes.

11 Q. And what's the size of your ownership interest in
12 Globefill?

13 A. 20 percent.

14 Q. Did you get that 20 percent in exchange for --

15 A. My creating the bottle. And also -- I also
16 worked and have worked throughout the history of the
17 company in the promotion of it.

18 Q. So you have a financial stake in the outcome of
19 this case?

20 A. Oh, yeah.

21 Q. And at the time that Globefill sued Elements and
22 Ms. Brandi, were you also an owner?

23 A. Yes.

24 Q. Did you participate in the deliberations leading
25 up to that lawsuit?

1 A. Only that I gave a deposition.

2 Q. Did you -- I'm focused on the decision to bring
3 the lawsuit. Did you have any role on that?

4 A. No, I did not -- I was not certainly consulted.
5 Pardon me. I was certainly consulted on it, but I
6 didn't -- I -- I -- lack of a better word, that's above
7 my pay grade. I didn't -- I wasn't -- I didn't make the
8 final decisions on that. I was enthusiastic that we
9 did. I just wanted to stop it. The cease and desist
10 letter I thought would do that.

11 Q. You wanted to stop Ms. Brandi from selling her
12 KAH Tequila in the market?

13 A. I did.

14 Q. And at the time that you wanted to stop
15 Ms. Brandi from bringing her KAH Tequila in the market,
16 despite your humble beginnings which we heard a lot
17 about, you're quite well off, aren't you, sir?

18 MR. BERG: Objection, Your Honor.
19 Materiality.

20 THE COURT: Sustained. As phrased,
21 sustained.

22 I sustained the objection. So counsel will
23 ask another question.

24 MR. BERG: Oh.

25 BY MR. RAFFERTY:

1 Q. Do you have a home in Manhattan, sir?

2 A. I have a loft that I rent in Manhattan.

3 Q. Do you have a place out in the country outside of
4 New York?

5 MR. RAFFERTY: Objection, Your Honor. Same
6 materiality objection.

7 THE COURT: Objection is overruled.
8 Counsel.

9 MR. RAFFERTY: Do you have a house outside
10 of Manhattan?

11 THE WITNESS: Yes.

12 BY MR. RAFFERTY:

13 Q. At the beach?

14 A. No. It's near the beach.

15 Q. What town is it in?

16 A. Amagansett, Long island.

17 Q. Is Amagansett, Long Island part of the Hamptons?

18 A. Yes.

19 Q. You've done quite well from the sale of your art?

20 A. Well, I've made a living at it since my adult
21 life.

22 Q. When you were enthusiastic about suing Ms.
23 Brandi, did anyone have any discussions about the
24 financial position that Ms. Brandi found herself in?

25 A. I didn't know anything about Ms. Brandi other

1 than the fact that KAH Tequila bottle I found deeply
2 offensive because it looked like something that I
3 invented as an idea as an vessel for alcoholic beverage.
4 And she'd taken that idea that we had a trade dress on,
5 and she -- as I said earlier, written me off, I thought.

6 Q. And you think that -- your testimony is that
7 people looking at the Crystal Head Vodka bottle and the
8 various KAH Tequila bottles would be totally confused as
9 to which is which?

10 A. No. I don't think totally is an accurate word.
11 I think that there is enough confusion that it is -- it
12 creates a problem for us.

13 Just as a -- if I may add, as an artist who has
14 somewhat of a reputation, I mean at least I'm -- I'm
15 still around. At my age, I still get shows. And I
16 still have a career. It is troubling to me that I'm
17 constantly asked wherever I go, these things are near
18 each other or not. Oh, did you do that bottle? Is that
19 yours? Did you make that? I'm asked that -- I get
20 asked that frequently. It comes up very often.

21 Q. Were you asked -- were any of those questions
22 posed after this lawsuit was filed?

23 A. The question started being posed the second it
24 hit the marketplace.

25 Q. Well, I'm trying to limit my time.

1 Was any posed to you after this lawsuit was
2 filed, after Elements and Ms. Brandi were sued?

3 A. Yes. I was asked as recently as last month.

4 Q. Did write down the information from the person
5 that asked you?

6 A. I made note of it.

7 Q. Are any of those people coming to testify here?

8 A. No.

9 Q. And despite the fact that you are suing Elements
10 and Ms. Brandi, none of those people are going to tell
11 the jury -- confirm what you just said you were asked?

12 A. These were people I met at an event. And the
13 bottles were on the table.

14 This is one example that happens a lot. But
15 people that -- it was an event actually honoring me.
16 But that -- people that were there as guests asked me.
17 They are not even people that I'm -- you know, I'm
18 not -- it's no one that I'm close to or friendly with.
19 People ask me that randomly. "Is that your bottle? Oh,
20 John, did you design that?" That kind of thing.

21 Q. What do you tell them?

22 A. I said, "No, I didn't design it."

23 MR. RAFFERTY: Your Honor, if I could ask
24 the deputy clerk to hand the witness Exhibits 56 and 57
25 which are the other two bottles.

1 THE COURT: The clerk will place Exhibit 56
2 and 57 before the witness.

3 BY MR. RAFFERTY:

4 Q. Mr. Alexander, I've now, I think, given you the
5 entire universe of KAH bottles.

6 A. I was just going to say, I won't be able to sleep
7 tonight.

8 Q. Well, that would make two of us.

9 The bottles that I've given you.

10 Let's just talk about the KAH bottles for a
11 moment. Do you view those pieces as works of art?

12 A. No.

13 Q. They are not works of arts at all?

14 A. No.

15 Q. Not even folk art?

16 A. When you use the term art, as I see it, I don't
17 think of -- I don't think this is a work of art either.
18 These are mass produced products for consumption. And I
19 think of folk art -- I'm a huge fan of folk art. And I
20 also find these quite attractive.

21 When you say the term art, A-R-T, associated with
22 it -- immediately my -- and I'm old school from the kind
23 of throw back to the 19th Century in terms of my art and
24 art making. Art to me is about something that's much
25 different than commerce. And so these are commercial

1 products.

2 And I was troubled as an artist, did I really
3 want to get into the commercial elements of this because
4 it is not something I've ever done. I've never done
5 anything accept making singular pieces of highly
6 originally, I think, I hope, that are clearly works of
7 art that contain the spiritual quality of visual
8 attention or pleasant. You know you can make an art
9 work that has to do with a sunset and a lake and a deer.
10 Or you can make an art work that has to do with some
11 kind of tragedy. And there's all kinds of ways -- so I
12 think of folk art by a folk artist as something similar
13 to this, but it is an individual object.

14 I just think of these as a commercial product. I
15 don't think of it as folk art, no.

16 Q. Let's stick to the KAH Tequila -- the Crystal
17 Head Vodka bottle. The drawings that you made, do you
18 consider those works of art?

19 A. I'm sorry?

20 Q. The drawings that you made that led to the
21 ultimate production of the bottle, were those works of
22 art?

23 A. They just were schematic -- I keep using the word
24 schematic. These were just studies for the product.

25 If I had wanted to make one of these into a --

1 what I would call an art work, I would have worked on it
2 much longer, perhaps. I would have signed it and
3 photographed it. It would have gone into a different
4 thing.

5 These drawings that I did, I was doing them
6 not -- this is where it was troubling to me. I was not
7 doing these drawings to try to make art works. I was
8 trying to use my talent as an artist to create this
9 commercial product, which is a skull-shaped bottle as a
10 vessel for alcohol.

11 Q. Did you succeed in that?

12 A. Well, we are in 70 countries.

13 Q. No. I'm talking about the artistic end. Did you
14 succeed in -- as an artist, in creating a bottle that
15 you're proud of as an artist, not as a captain of
16 industry?

17 A. The reaction to this bottle has been so
18 overwhelmingly positive that I'm actually rather proud
19 of the way it looks. I must say that there was
20 tremendous trepidation and worry in the beginning
21 because I thought, this is not -- this is not good for
22 me. But it -- because of my friendship with Dan and the
23 deep, long friendship, he was so enthusiastic about it,
24 he got me enthusiastic about it, that I just went into
25 it with both feet full blown. But it is so off the

1 wall, not something I would normally do.

2 Q. So you don't consider your bottle art?

3 A. Others do.

4 Q. Okay.

5 THE COURT: Wait just a moment. Do you
6 consider it art? Is that Counsel's question?

7 MR. RAFFERTY: That was my question.

8 THE COURT: Try to answer that question if
9 you can.

10 THE WITNESS: You could make the case, if I
11 was wanting to be very egotistical about it, that as a
12 successful artist everything I do is creative and
13 physical is art.

14 BY MR. RAFFERTY:

15 Q. Do you believe that?

16 A. I'm not that much of an egotistic. But, yeah,
17 that's probably true.

18 Q. And you don't view the four KAH bottles as art?

19 A. These look to me -- no, I don't.

20 Q. Someone painted on some of them, didn't they?

21 A. Those are all mechanically done. There's no
22 painting done on those by hand, I don't think.

23 Q. Do you know?

24 A. No, I don't. I cannot answer that.

25 Q. So if -- even if you did it mechanically, you'd

1 still have to have something to work off? Someone's got
2 to do the original work, don't they?

3 THE COURT: Counsel, couple of questions.
4 Which one?

5 BY MR. RAFFERTY:

6 Q. You don't know whether they were handpainted or
7 painted by machine?

8 A. I'm going to say that I think they were painted
9 by machine.

10 Q. And in the instances which things are painted by
11 machine, how do you get there? How do you get the
12 machine to do what you want it to put out?

13 A. I think that the technical people are capable of
14 doing that do it.

15 Q. Do they do it, as in your case, by taking a
16 drawing or a sketch and doing schematics that are then
17 used?

18 A. I wish I could answer that. I actually don't
19 know.

20 Q. You just don't know?

21 A. I don't.

22 Q. So --

23 A. But I think that in terms of art or not art, I
24 think that the KAH Tequila bottle is not only a rip-off
25 of my idea and my bottle and my invention, so to speak,

1 which it is. And this is not only a rip-off my bottle
2 and my invention, but it's also in my opinion, it's
3 stealing this from the Day of the Dead celebration,
4 which is a very spiritual and reverential occasion. So
5 I don't -- I don't have anything else to say about that.

6 Q. So you believe that somehow the KAH Tequila
7 bottles steal some idea or thought from the Day of the
8 Dead?

9 A. It is very clear. They state that. I mean, you
10 stated. But they were saying it here in the courtroom,
11 it's all about the Day of the Dead.

12 Q. When you look at those bottles, do you think of
13 the Day of the Dead?

14 A. Yes.

15 Q. Okay. When you look at the Crystal Head Vodka,
16 do you think of the Day of the Dead?

17 A. Well, I can think that simply because I know that
18 much of the idea about using a skull like that came out
19 of a lot of exposure to Day of the Dead symbolism. The
20 skull was being used that way. But not as a vehicle for
21 alcohol.

22 Q. When Crystal Head Vodka markets itself, does it
23 market itself as a results or a product of the Day of
24 the Dead?

25 A. Not to my knowledge.

1 Q. In fact, it markets itself as something that
2 flows from the legend of the 13 crystal skulls, doesn't
3 it?

4 A. That was the -- at the earliest stages of our
5 company back in the beginning, that was the marketing
6 plan that we used to market it.

7 Q. Marketing had nothing to do with the Day of the
8 Dead?

9 A. No.

10 Q. And it had everything to do with the legend of
11 the 13 crystal stones?

12 A. No. But I would like to think, and I hope I'm
13 right, that the marketing had to do with -- the success
14 of this had nothing whatsoever to do with the legend of
15 anything. It had to do with the physical shape and the
16 feeling and the creativity that went into making this an
17 iconic thing that people would find appealing. It had
18 no -- that is the way I feel.

19 MR. RAFFERTY: And Your Honor, if I might, I
20 would like to have the deputy clerk pass -- publish to
21 the jury the actual bottles?

22 THE COURT: And maybe you could identify
23 which one bottles you are talking about.

24 MR. RAFFERTY: I would like to pass them
25 all, Your Honor. Because I am going to try give them

1 each a voice. Exhibits 45, 55, 56, 57, and 58.

2 THE COURT: The clerk may circulate those to
3 the jury.

4 45, 55, 46, 57 and 58. Am I correct?

5 MR. RAFFERTY: You are, Your Honor.

6 So the 45 is the Crystal Head bottle. 55 is
7 the Blanco -- it's already on the -- there's a duplicate
8 on --

9 THE CLERK: This is 55.

10 MR. RAFFERTY: She can use either.

11 THE CLERK: 55.

12 MR. RAFFERTY: 45 is the Crystal Head
13 bottle. 55 is the Blanco, the white one. 56 is the
14 Resposado, the yellow. 57 is the Anejo, the black one.
15 And the other black one with the crystals is 58.

16 THE COURT: The clerk should be circulating
17 five bottles.

18 THE CLERK: Counsel, did you say 58?

19 MR. RAFFERTY: Yes.

20 THE COURT: 45, 55, 56, 57, and 58.

21 MR. RAFFERTY: Could we also circulate

22 No. 700? I would like to give 700 to the witness.

23 772.

24 THE COURT: 700 and 772?

25 MR. RAFFERTY: 772. I got the number wrong.

1 I apologize, Your Honor.

2 THE COURT: 772 is the exhibit to be placed
3 before the witness.

4 THE CLERK: It is before the witness.

5 THE COURT: Now, does Counsel wish to have
6 that circulated as well?

7 MR. RAFFERTY: No. That one can stay with
8 the witness.

9 THE CLERK: Okay.

10 THE COURT: I think the jurors have examined
11 the bottles. And so the clerk may retrieve those.

12 Counsel, you may continue with your
13 examination.

14 MR. RAFFERTY: Thank you, Your Honor.

15 BY MR. RAFFERTY:

16 Q. Mr. Alexander, could you just take a close look
17 at Exhibit 772, which is still in front of you, the
18 Blanco bottle.

19 A. Yes.

20 Q. Can you tell me whether or not it is hand painted
21 or machine painted from looking at it?

22 A. This one looks -- this one looks more hand
23 painted.

24 Q. Okay. So if it's hand painted --

25 A. I'm not sure though. There are parts of it that

1 look hand painted.

2 Q. If it is painted, does it qualify as a piece of
3 art?

4 A. No.

5 Q. Now, the bottles themselves, the Globefill
6 Crystal Head bottle has a particular stopper, doesn't
7 it?

8 A. Yes.

9 Q. And it identifies itself as Crystal Head Tequila
10 -- Crystal Head Vodka?

11 A. The stopper?

12 Q. No, not the stopper. The bottle itself?

13 A. Yes.

14 Q. And the KAH Tequila bottles identify themselves
15 as KAH bottles on the stopper and on the neck?

16 A. Yes.

17 Q. And you see that by just looking at the bottle?

18 A. If you carefully examine it, you can.

19 Q. So if you picked it up to buy it, you could see
20 it?

21 A. You certainly wouldn't know if you got it off a
22 bar or at a restaurant.

23 Q. That wasn't my question, sir.

24 A. Oh, sorry.

25 Q. If you picked it up to buy it, you could see that

1 it was a KAH Tequila bottle?

2 A. Yes.

3 Q. And do you have any trouble recognizing the KAH
4 Tequila bottles versus the Crystal Head Vodka bottle?

5 A. What do you mean?

6 Q. Do you have any trouble when you -- they've been
7 passing them around today. Do you know which are which?

8 A. Sure.

9 MR. RAFFERTY: I have no further questions
10 at this time, Your Honor.

11 THE COURT: Redirect? Oh, I'm sorry.
12 Mr. Miller.

13 MR. MILLER: Just a smidge, Your Honor.

14 THE COURT: Yes.

15

16 **CROSS-EXAMINATION**

17 BY MR. MILLER:

18 Q. Good afternoon, sir.

19 A. Hi. How are you?

20 Q. We met earlier too. I'm John Miller. I
21 represent Kim Brandi.

22 I just want to ask you a couple follow-up
23 questions. You were at an event recently when somebody
24 pointed to a KAH bottle on the table and asked if that
25 was your brand?

1 A. Yes.

2 Q. And where was that event?

3 A. Dallas, Texas.

4 Q. What kind of event was that?

5 A. I'm sorry?

6 Q. What kind of event was that?

7 A. It was at a cocktail party dinner at someone's
8 house that was -- the party was for -- in my honor.

9 Q. Which of the KAH bottles was it?

10 A. I don't remember. There actually were two or
11 three there.

12 Q. Were there Crystal Head bottles on the table as
13 well?

14 A. It was a bar. It was a large bar. And they were
15 both on the bar. And then there were Crystal Head
16 bottles from the front of the bar, because they put them
17 there for me. Because -- it was there for me.

18 MR. MILLER: That is all I have. Thanks.

19 THE COURT: Thank you.

20 Redirect?

21 MR. BERG: Just very briefly.

22 THE COURT: All right.

23 **REDIRECT-EXAMINATION**

24 BY MR. BERG:

25 Q. Johnny -- or Mr. Alexander, you were asked about

1 your ownership interest in Crystal Head?

2 A. Yes.

3 Q. And you invested your time and your effort in
4 exchange for your ownership?

5 A. Yes.

6 Q. And what did you hope to accomplish by becoming
7 an owner?

8 A. Well, I hoped that it would make money.

9 Q. And did you have a specific thought in mind about
10 your family?

11 A. Yes.

12 Q. Would you please explain to the jury what you
13 mean?

14 A. Well, I'm not getting any younger. And I've
15 noticed that, you know, it gets harder and harder at my
16 age to climb up on ladders and make paintings.

17 Q. How old are you, sir?

18 A. 71.

19 And -- this morning. I'm 76 now. I've aged five
20 years today.

21 Q. He said he's --

22 A. I just hope the success of this company would
23 afford my family -- because the only thing we actually
24 have -- I'm mean, the way I make my living is painting
25 pictures.

1 And there is -- there is not some huge inventory
2 out there that they could use. And that there would be
3 some other source of income for my family so that when
4 I'm no longer here that they wouldn't have to worry
5 about selling my art or selling off the stuff that I've
6 done and -- because it's extremely difficult to do. I
7 didn't want to burden my family with that. And so I
8 hoped that this would be a profitable venture.

9 Q. It was mentioned that you live in Amagansett. Do
10 you have any particular involvement -- or have you
11 had -- in Amagansett in a civic way?

12 A. Yes, I have, several civic ways.

13 Q. Tell us what you have done.

14 A. Well, we have been involved -- from a charitable
15 standpoint in a project called The Wounded Warrior
16 Project.

17 Q. Is that you or the company?

18 A. The company. And me, too, to some extent
19 communitywise.

20 But I'm most proud of the fact that for 25 years
21 I'm an active volunteer fireman.

22 Q. Are you still?

23 THE COURT: Excuse me. Is he still?

24 MR. BERG: A volunteer fireman.

25 THE WITNESS: Now, when I reached a certain

1 age, I stopped being active, because I didn't feel that
2 I was capable physically to do that kind of stuff. And
3 it -- I was getting too old for it, so I retired. But
4 I'm still part of the department. I just don't make
5 ambulance and rescue calls and fires anymore. I stopped
6 doing that.

7 BY MR. BERG:

8 Q. One last area of questioning. You were asked if
9 you were trying to stop Ms. Brandi from selling KAH
10 Tequila.

11 What is it you are asking her to do? What are
12 you trying to keep her from doing?

13 A. I'm trying to keep this bottle that I consider a
14 direct copy of my bottle as an idea, which we have trade
15 dress for, legally we have the right to a market alcohol
16 in a skull-shaped bottle. It doesn't say, Clear
17 painted, red, green or blue. It is alcohol in a
18 skull-shaped bottle. And I would like to stop her from
19 doing it.

20 Q. Do you want to stop -- would you have an
21 objection if she changed the bottle and sold tequila?

22 MR. RAFFERTY: Your Honor, objection.

23 THE COURT: Sustained.

24 BY MR. BERG:

25 Q. Tell us whether or not you want to stop her from

1 selling tequila in any bottle?

2 A. Oh, absolutely not. I would wish her well.

3 MR. BERG: Thank you.

4 Pass the witness, Your Honor.

5 THE COURT: We've completed the examination
6 of this witness. This is a logical break time.

7 The jurors may have questions of this
8 witness. So if you do, this would be the time to write
9 them.

10 And then I would inquire of counsel, may be
11 witness be excused.

12 MR. BERG: Yes. But if they have questions.

13 THE COURT: Well, No. I'm asking now. So
14 if they have questions, they would write them down and
15 send them.

16 But I think they have no questions.

17 So may the witness be excused?

18 MR. BERG: He can. I do think the witness
19 is going to stay as long as he can until he has to
20 attend to a personal matter, Your Honor.

21 THE COURT: Any objection to the witness
22 being excused?

23 MR. RAFFERTY: No objection, Your Honor.

24 THE COURT: So the witness is excused. That
25 means you may stay if you wish, but you don't have to.

1 THE WITNESS: Thank you all for your
2 courtesy. Appreciate it very much.

3 THE COURT: The witness is excused.

4 So we do have one additional witness that we
5 will be taking today so we are not going to recess as
6 early as I thought. We are going to let counsel
7 complete their examination of that witness.

8 So for that reason we'll take a longer break
9 now. Normally this would be 15 minutes. But it will be
10 a little over 30 minutes. Sufficient time for those who
11 want to get something to eat, hopefully to do that.

12 So the return time will be 1:00 o'clock.

13 So the jurors are excused now. Come back at
14 1:00 o'clock and we'll hear the next witness.

15 Counsel are excused, and we will resume at
16 1:00 o'clock. And I'm hoping we can complete that
17 second witness before we recess. Thank you.

18 THE CLERK: Please rise. This court is in
19 recess.

20 (RECESS.)

21 THE COURT: We are back on the record. We
22 have our jury, and we are ready to go.

23 The next witness.

24 MR. FAY: Plaintiff Globefill would like to
25 call Jonathan Hemi.

1 THE COURT: All right. The witness may come
2 forward. And the clerk will administer the oath.

3 THE CLERK: You can step up to the witness
4 stand.

5
6 JONATHAN HEMI,
7 Called as a witness herein, having been first duly
8 sworn on oath, was examined and testified as follows:

9 THE WITNESS: I do.

10 THE CLERK: Please have a seat. State and
11 spell your name for the record.

12 THE WITNESS: Name is Jonathan Hemi.
13 J-O-N-A-T-H-A-N, H-E-M-I.

14 THE COURT: Counsel may proceed.

15

16 **DIRECT EXAMINATION**

17 BY MR. FAY:

18 Q. Good afternoon, Mr. Hemi. Could you introduce
19 yourself to the jury, please.

20 THE COURT: What is the question? That is
21 so general and so broad.

22 MR. FAY: Who are you; where do you live?

23 THE WITNESS: I'm Jonathan Hemi. I live in
24 Toronto, Ontario, Canada. I'm the managing partner at
25 Globefill Incorporated.

1 BY MR. FAY:

2 Q. Mr. Hemi, is Globefill Incorporated a plaintiff
3 in this action?

4 A. We are.

5 Q. And you said managing partner, can you tell the
6 jury what that entails?

7 A. So the managing partner basically is the
8 equivalent of probably the president or CEO of a
9 company. So very involved in the day-to-day operations
10 of the company.

11 We have our staff, our head office in Toronto.
12 That's where some of our staff reside. Involved in
13 budget, forecasting, the general running of the
14 corporation.

15 Q. Okay. You said you have some of your staff in
16 Canada.

17 Do you have staff anywhere else?

18 A. We do. We have a couple of people in the United
19 States. One in Southern California. We do have a few
20 people in Europe. Total company's about 17 people.

21 Q. What is the business of Globefill?

22 A. So Globefill Incorporated is the makers of
23 Crystal Head Vodka. And our job is to not only produce
24 and manufacture Crystal Head Vodka but to also sell it
25 globally, if possible. And to market it like any other

1 alcoholic beverage brand.

2 Q. Does Globefill manufacture any other spirit?

3 A. We do not.

4 Q. Do you manufacture any other vodka?

5 A. We do not.

6 Q. When did you start working at Globefill?

7 A. I was actually hired in early December. I was
8 made aware very early, mid-November was when --
9 mid-November 2007 is when I was actually first
10 introduced to everything. And then by early December, I
11 had started. So December 2007.

12 Q. Mr. Hemi, why don't you describe that
13 introduction that you just mentioned?

14 THE COURT: I'm not sure what the question
15 is.

16 BY MR. FAY:

17 Q. Mr. Hemi, you just referred to the fact that you
18 were introduced to Globefill.

19 A. Correct.

20 THE COURT: And so what?

21 BY MR. FAY:

22 Q. And so could you describe that introduction?

23 A. Sure. So back in November 2007, Dan Aykroyd had
24 a project that he wanted to work on. It was Crystal
25 Head Vodka. And I was one of the people he wanted me to

1 get involved in running the business and taking it from
2 the bottle and the concept to the actual commercial end
3 of the business, to build the business around this
4 product, to market it and to start running a business.

5 Q. When did you officially become an employee of
6 Globefill?

7 A. Early December. 2007. I don't know the exact
8 date.

9 Q. And once you started your employment with
10 Globefill, what did you do?

11 A. Originally my job was vice president of sales and
12 marketing. And originally it was to develop the
13 original marketing plan on Crystal Head Vodka to the
14 partnership. And it was to help develop the -- help
15 develop the making of the vodka, as well as finalize the
16 bottle as well. So the bottle was pretty much done.
17 But there was still some little tweaks left in the
18 manufacturing level that we needed to do.

19 Q. When you started in December 2007 were you making
20 vodka?

21 A. Not yet, we were not.

22 Q. Where you producing bottles of vodka?

23 A. We just had the fourth prototype bottle. So
24 there were several prototypes that happened before this
25 to get to what you see today. So we were given that

1 last prototype bottle.

2 Q. Had you launched Crystal Head Vodka yet?

3 A. No.

4 Q. Was it your job to launch Crystal Head Vodka?

5 A. It was.

6 Q. So did you put together that market plan that you
7 mentioned?

8 A. Yes, I did.

9 Q. What went into that?

10 A. So generally the way we would do any marketing
11 plan, we would research the market, which was North
12 America to start. We would pull information from trade
13 publications, articles, magazines, and then get a
14 feeling of who our main competitors were going to be at
15 the time. The category itself. The price category, and
16 things like that. You know, a SWOT analysis, what they
17 call, which is the strengths, weaknesses, opportunities,
18 threats.

19 And then from there, once we identify that, we'd
20 look to how we are going to enter that market. What
21 would be the most efficient and productive way to enter
22 that market. And from there, that's how we started
23 developing our marketing plan.

24 Q. What market for vodka did you decide to try to
25 enter?

1 A. We went into the super premiums and luxury vodka
2 market.

3 Q. And what price point were you looking at?

4 A. We were looking at approximately \$50 a bottle,
5 retail.

6 Q. And where did you intend to initially launch this
7 product? Which part of the world?

8 A. Specifically the United States.

9 Q. Okay. Now, could Globefill -- is Globefill a
10 Canadian corporation?

11 A. It is.

12 Q. Could Globefill sell Crystal Head Vodka directly
13 into the United States?

14 A. No.

15 So the alcohol -- the alcohol beverage market in
16 the United States is what we call a three-tier system.

17 You need an importer, because it is -- it is --
18 you know, it is a controlled substance. You do need an
19 importer with the proper licensing for the United
20 States. And then that importer will sell to a state
21 distributor. And that distributor will then be allowed
22 to sell to bars, retail stores, you know, restaurants,
23 things like that, before it even gets to the consumer.

24 So before you even see it, it's gone through
25 three other levels.

1 Q. Okay. Did you arrange for Crystal Head Vodka and
2 Globefill to have a relationship with an importer?

3 A. I did.

4 Q. What importer is that?

5 A. I chose Infinium Spirits.

6 Q. Why did you choose Infinium Spirits?

7 A. Couple of reasons. First of all they specialized
8 in premium spirits. So there's a lot of importers that
9 carry a lot of different products. And it's very hard
10 to be good at both. Wine and spirits generally don't
11 mix as well. So we chose one that was highly focused on
12 premium spirits.

13 Second reason why is, they were based in
14 California, which is the largest luxury vodka market
15 probably in the world.

16 And then the third reason is is to have an
17 adequate size sales team that could help us cover the
18 marketplace with distributors.

19 Q. Prior to your employment at Globefill, did you
20 have experience in the spirits market?

21 A. I did.

22 Q. What was that experience?

23 A. So I do own another company, it's a distribution
24 company I've owned since 1995 in the wine and spirits
25 industry. And I probably launched about 15 or 16 other

1 spirit products into the United States, Canada, even
2 parts of Asia.

3 Q. Was that the reason you were hired by Globefill?

4 A. Yes, I believe so.

5 Q. And when did you first approach Infinium about
6 being an importer for Crystal Head Vodka?

7 A. We first approached them in about -- in
8 March 2008.

9 Q. So that's about four months after you were
10 employed?

11 A. Correct.

12 Q. Okay. And what did you do? What did you say to
13 them?

14 A. Well, we put -- the initial call was in February
15 once I knew we had everything ready to show. The
16 marketing plan was signed off by then by the partners.
17 We determined the path we were going to take with the
18 liquid with the vodka itself. And then we set up that
19 initial meeting.

20 And I basically did a very similar presentation
21 to Infinium that I did for others.

22 Q. Did Infinium agree to be your importer?

23 A. Instantly, actually. It's never happened to me
24 before.

25 Q. Were they excited about being your importer?

1 A. Absolutely.

2 Q. And as the importer, do they actually buy the
3 product from you?

4 A. They do. They actually take title. They do have
5 to warehouse it. And then they do have to resell it.

6 Q. So they make a financial commitment to the
7 product?

8 A. 100 percent.

9 Q. Now you have an importer. It's March of 2008.
10 What happens next?

11 A. The next thing is, we have an importer, and that
12 importer is now going to have to start selling to
13 distributors -- or at least presenting our brand to
14 distributors across the United States.

15 So that was the next stage, which was: Develop a
16 plan with Infinium sales team to go and pitch our
17 product to the various distributors in the United
18 States.

19 Q. Does Globefill today work with distributors in
20 the United States?

21 A. We do. We don't work directly with them because
22 there's a certain hierarchy as we're all familiar with.
23 You don't want to go above anyone's head. So when we do
24 work with distributors or retailers even, we'll make
25 sure that we work through the Infinium team and with the

1 retailer. We'll make sure that we work with that state
2 distributor. They don't like you going and see Costco
3 direct or Beverages and More direct. They feel kind of
4 out of the loop and -- I don't blame them. So we
5 respect the hierarchy very much.

6 Q. How many distributors in the United States
7 distribute Crystal Head Vodka?

8 A. 51.

9 Q. One for each state. And one state's got two?

10 A. Well, Washington, D.C. is it's own.

11 Q. I see.

12 A. The 50 states plus D.C.

13 Q. Okay.

14 A. So by law a lot of the times you are only allowed
15 to have one. In a lot of the states you can have only
16 one distributor in that state.

17 Q. Okay. What kinds of things did you do with
18 Infinium to assist the distributors that would
19 ultimately distribute Crystal Head Vodka?

20 A. So one of the things -- well, we did a lot
21 things. Besides being extra feet on the street, we also
22 had put together marketing plans, incentive plans for
23 these distributors and for the retailers as well.

24 And the reason why is, these distributors are
25 massive. The average distributor will have about 10- or

1 12,000 other products. They are so big.

2 So as you can imagine, you got to get some
3 attention in there. You've got to get their attention.
4 And one of the ways that's commonly done for especially
5 smaller brands like us is to develop some type of
6 incentive program, some type of Dan Aykroyd plan program
7 in some cases, things like that.

8 Once we would do that with the distributors, we
9 would do something similar with the key retailers. So
10 things like bottle signings are a great way to engage
11 and get to develop a relationship with, you know, for
12 example, Binny's in Chicago, it was a large chain. Or
13 the Beverages & More guys. Mission Liquors.

14 Q. Who buys Crystal Head Vodka from those
15 distributors?

16 A. So once the distributors agree to purchase the
17 product, they bought -- physically do buy it from the
18 importer. They will resell it to bars, hotels,
19 restaurants, retail stores.

20 Q. And does Globefill on behalf of its product,
21 Crystal Head Vodka, do anything to assist those bars and
22 restaurants, liquor stores and hotels?

23 A. Absolutely. So with Infinium as well, we do have
24 to give them some credit. So with Infinium as well, we
25 do help do things. Like we do have our own brand

1 ambassadors, for example. Where all they do is once the
2 distributor gets that product into, let's say, a
3 Denny's, we will send in either one of our people or one
4 of our brand ambassadors, and they will make sure that
5 those people are educated on our brand, aware of it, how
6 to price it properly, things like that.

7 Because distributors are really key to get you
8 into the market. But a lot of times the execution is
9 not as good as it can be. So they will drop off a
10 bottle, but that's about it most of the time. So it is
11 really, really important to make sure -- especially with
12 a premium brand -- you know, \$50 vodka, you've got to
13 explain, why is this \$50. Why should I be buying this?
14 How do I sell this to my customer. So that's where we
15 come in. Again, respecting the hierarchy, but we do do
16 that.

17 Q. Then finally, what does Globefill do to reach
18 that ultimate consumer, the person who either buys a
19 bottle of Crystal Head Vodka or has a drink at a bar or
20 restaurant?

21 A. So that's where we work with these retailers and
22 with these bars to start developing feature cocktails,
23 incentive programs, things like that, to help bartenders
24 and wait staff to recommend the product. Making sure we
25 get it on the menu and we price it appropriately, not

1 too high, not too low. Things like that.

2 And then a lot of relationship building. We are
3 constantly out there building relationships. We don't
4 have -- you know, we are 17 people globally. We do not
5 have multimillion dollar budgets. So we have to do a
6 lot of the ground work ourselves. We can't just take up
7 billboard ads in 50 states or TV commercials from that
8 perspective.

9 Q. Is marketing a product like Crystal Head Vodka,
10 is that a lot of relationships?

11 A. It's all relationship, especially in our size.

12 Like I said, we don't have that ability or that
13 leverage that a bigger company would have with manpower
14 and with marketing dollars.

15 Q. Okay. Now you mentioned -- let's move on to the
16 vodka itself. When you showed up in December of 2007,
17 had the vodka itself been decided upon?

18 A. No. It wasn't really finalized at that point
19 yet.

20 Q. Did you then take steps to finalize, decide what
21 that vodka would be?

22 A. Yeah. So part of our marketing analysis was to
23 find out where we would fit in the marketplace. And
24 based on that, we chose to be a pure vodka.

25 We found that none of the major big players in

1 the category -- some are going after smoothness. Some
2 are going after, you know, other things. But no one was
3 going after or attacking the purity angle. And we
4 realized a lot of population didn't realize how many
5 additives are put in vodka. Because people think, oh,
6 it's clear, it's tasteless, so they probably don't add
7 anything. And we started developing our vodka we
8 realized, oh, geez, there's actually quite a bit of
9 stuff that can be put in here, and it's all okay. There
10 is nothing against the law.

11 So we thought, this is a great opportunity for us
12 to start playing in that market, which would be the
13 purity market, no additives added to our vodka.

14 And that's kind of -- and from there, we started
15 developing different versions of Crystal Head to get it
16 taste the way we wanted it to taste.

17 Q. Why would the manufacturer of vodka add anything
18 to it other than vodka?

19 A. Well, it depends what they are going for. But if
20 you add certain things to your vodka, you can go a
21 little cheaper on your grain and on your quality of
22 other ingredients.

23 So if you add some oils to it, it makes it a
24 little more slippery so you don't feel as much burn
25 going down. In some of these products you can

1 actually -- if you actually pay attention to it, what
2 you're actually getting on your tongue is a little bit
3 of oil and it allows it to slide down without you
4 feeling as much heat.

5 So it is a great way to mask some of the poor
6 qualities of the grain. And it is a great way to mask
7 some of the poor distillation processes and filtration
8 processes, because that's where your cost is, right.

9 Q. Are there any such oils in Crystal Head Vodka?

10 A. No.

11 Q. Are there any additives of any sort?

12 A. No.

13 Q. How did you get from December of 2007 to having
14 what you thought, and the rest of the folks at Globefill
15 thought, was an acceptable no additive vodka?

16 A. Well, the first thing we did is we bought
17 competitor products and tasted them. Sounds like an
18 easy job. But actually it's kind of hard to taste a lot
19 of people's vodkas. And we got to learn about what we
20 liked and what we didn't like.

21 Once which found out what we liked, we then went
22 to our distillery that we used. We use a government
23 distillery. It's actually the last government owned
24 still in North America. It's called the Newfoundland
25 and Labrador Liquor Corporation. I just call them NLLC.

1 It's easy for me.

2 And we went to them saying, okay, we know what we
3 like. Now we got to do it without additives, basically.
4 And that's when they kind of laughed at us.

5 Q. Why did they laugh?

6 A. They laughed at us. They didn't laugh. They
7 said, you're kind of kidding.

8 The reason why is, in order to do that, if you
9 take out all additives, it's pretty hard to get a really
10 smooth tasting vodka. And they were right. The first
11 few versions were not very good.

12 And then we realized we needed to upgrade things
13 like the grain and the filtration and how we distill it.
14 And how many times we distill it.

15 And then it started coming together. As you add
16 cost to these things and increase your quality, you can
17 do it. And not only can you do it, you can do it pretty
18 good. Because we've won some of the biggest metals in
19 vodka now.

20 Q. Do you know what the term mash means when it
21 comes to the distilling process?

22 A. Yeah, I do. So it's actually -- do you want me
23 to explain it?

24 Q. Yes.

25 A. So a mash is the step before you actually

1 distill. So just very quickly, what they do is, you
2 take the grain or the corn. We use what's called a
3 peaches and cream corn, which is a sweet corn, native to
4 Ontario, Canada and Ontario. It's stuff that you can
5 barbecue with. It's not cattle corn which some vodkas
6 are made from, maize. Ours isn't maize. And what they
7 do is you mix that with water. You kind of make it into
8 almost like a cereal. Then you add yeast to it. And
9 then it creates the fermentation process which accesses
10 the sugars from these grains that will eventually
11 convert it to alcohol.

12 So once you have that mash done and you've added
13 the yeast to it, then you basically want to distill it.
14 And what distilling basically is is, in it's simplest
15 form, you're basically heating and cooling that mash to
16 remove impurities from the vapors. And then when you
17 cool it, those vapors that were heated turn into a
18 liquid and that's the distillate. That's the pure
19 alcohol. That's at about 95 percent alcohol. And then
20 you cut that with water. Again, water is a key
21 component of the final quality as well of your vodka.
22 Because 60 percent of it is water.

23 Q. Okay. How many mashes or experimental mashes did
24 Globefill go through before they came upon the one that
25 they thought was right for their vodka?

1 A. So we went through 20 versions, about, maybe 21,
2 I want guess about 20, there were a lot. And like I
3 said, the first few were tough. And then we started
4 making changes, adding dollars, making it more expensive
5 for us, but also at the same time producing a much
6 better quality vodka without the additives.

7 Q. And finally, you decided upon this peaches and
8 cream corn, right?

9 A. Yes.

10 Q. And that was a unanimous decision by the various
11 principals of Globefill?

12 A. It was.

13 Q. Now, how many times is Crystal Head Vodka
14 distilled?

15 A. That is another process. We chose to distill it
16 four times. We like four. We like it -- you can
17 distill -- you can distill things a hundred times if you
18 want. Every time you distill though, you start removing
19 flavors. You are removing purities, but you start
20 stripping out flavors. So you kind of have to be
21 careful. If you do it too much it's going to taste like
22 water.

23 You really want to find that balance where it
24 allows you to remove as many impurities as you can
25 without stripping out every bit of flavor. For us, it

1 was four. For others, it might be something else. We
2 choose to do it four, which is a lot.

3 Q. So, again, you started at Globefill in December
4 of 2007. By approximately what time had you made your
5 decision on the vodka that would go into your product?

6 A. So by March, middle to the end of March, just
7 before we were ready to present to Infinium, we had our
8 first sample that we made that we were comfortable with.

9 Q. Okay. Now, is there anything else that goes into
10 selling a bottle of vodka?

11 A. Oh, yeah, there's a lot.

12 Q. Example, is there a bottle?

13 A. Yeah, you need a bottle. You need a bottle. You
14 need a liquid. You need great liquid, not just liquid.
15 You need great liquid. You need a lot of hard work.
16 You need to do a launch. There's a whole number of
17 things that you have to do, from a lot of relationships,
18 a lot of getting on the rode, a lot of traveling.

19 Q. When you showed up in December 2007, I think you
20 said that you had -- or maybe you didn't. But did you
21 have a prototype of a bottle?

22 A. Yeah, we did. It was the fourth and final
23 prototype of the bottle. And that, like I said, was
24 95 percent the way you see it now.

25 Q. Okay. What did you have to do between December

1 of 2007 and the launch of Crystal Head Vodka to get that
2 bottle to the point where you could make thousands of
3 them?

4 A. Well, first of all, we have to approve a final
5 bottle, and then make the mold. And molds take a long
6 time. Especially -- well, our mold takes a long time to
7 make. So we did tweak the neck a bit and make it a
8 hexagonal shape neck. It's hard to show you, because I
9 don't have it.

10 Then we increased the flange on the neck a little
11 bit. Deepened the eye sockets a little more. Gave a
12 little more definition to the teeth.

13 And from there, once we had the bottle, then we
14 had the vodka, we had the importer. Now we had the
15 launch.

16 MR. FAY: Could I ask the clerk to give
17 Mr. Hemi Exhibit 45.

18 THE COURT: 45?

19 MR. FAY: 45, Your Honor. It is that clear
20 bottle right there.

21 THE COURT: The clerk will place it before
22 the witness.

23 BY MR. FAY:

24 Q. Okay. Mr. Hemi, do you recognize that?

25 A. I do.

1 Q. Have you seen a few of those?

2 A. Yes.

3 Q. What is that?

4 A. Bottle of Crystal Head Vodka.

5 Q. Now, is that a difficult vodka to make --
6 difficult.

7 Is that a difficult bottle to make?

8 A. It is. You know, we went to Bruni Glass and
9 Bruni Glass is probably one of the best if not the best
10 bottle makers in the world. And we went to -- they had
11 a factory in Slovenia. It's a crystal factory in
12 Slovenia. It's a specialty glass. And actually a lot
13 of Eastern European countries are really great at making
14 specialty glass.

15 So this was probably the most difficult bottle
16 they had ever made in all their years. I'm fortunate
17 enough to -- over the years, because of this bottle --
18 get to know the owners of Bruni Glass, because they were
19 so impressed. They put this on their Website. They are
20 proud to be able to accomplish something like this.

21 Q. And there has been some testimony about the spout
22 on that bottle. Did the spout cause any particular
23 difficulties for you?

24 A. Yeah. Anyone who has been in the industry,
25 especially as long as I have. The first thing I didn't

1 like about it was the spout. Not that I didn't like it.
2 It looks beautiful. But when you are in the industry,
3 you are thinking about production, you are thinking
4 about costs, you are thinking about marketing, you are
5 thinking about a whole bunch of things that an artist
6 really isn't. This was a problem. But I lost that
7 battle. My first loss.

8 Q. Why is it a problem?

9 A. Well, you know, I have been around bottle lines a
10 long time. And I've worked with other distilleries.
11 The way that it -- it delaminates the ability to do mass
12 production.

13 So the way bottle lines work is, the bottles get
14 filled on a line. And you basically have a filler. And
15 that filler only goes straight up and down. And the
16 problem with this bottle is -- you try to put something
17 straight up and down, it's going to chip it. So what
18 happens is, you need to either make the bottle neck
19 straight, like that, or hand fill it, and then you have
20 to hand cork it.

21 When you are hand corking and hand filling, you
22 are also hand labelling. So it becomes a lot more
23 expensive and a lot slower.

24 Q. Did Globefill hand fill, hand cork and hand
25 label?

1 A. Yes. I even did nine myself. Yes. So your
2 standard automatic bottling line would have maybe two
3 people on the line. We had 22 people with these to make
4 sure -- it wasn't pretty. But on the factory floor we
5 had these steel tables. And they had the labeling guy
6 with the special -- had held it like this. You have the
7 corking guy with the -- you'd cork it by hand. And we
8 would fill it.

9 And then we would, with hairdryers, use the heat
10 shrinker to tamper proof evidence, seal. And then
11 packed by hand. Yeah.

12 Thank God I only had to do nine. But I needed to
13 understand it.

14 Q. Now, does -- did Globefill do anything to ensure
15 the quality of that bottle?

16 A. Yeah. So, you know, being the most expensive --
17 or one of the most expensive vodkas to ever hit the
18 market, the consumer expects perfection. And I don't
19 blame them. I would too.

20 So the first thing we do -- quality starts at
21 every level, whether it's the liquid or the bottle, or
22 how we go to the market, or even the activations we do.
23 It has to be perfect.

24 So from a glass perspective -- first of all, we
25 chose Slovenia, which is not cheap. A crystal company

1 is a lot more expensive than a normal glass factory. So
2 the first thing we did was -- the Slovenian plant would
3 put bits of actual crystal in the sand when they would
4 melt, so that you get an extra clear glass bottle.
5 You'll see a lot of our bottles, they're a lot clearer
6 than other clear bottles. And that's because of that
7 little bit of extra crystal. Because there is usually
8 no crystal. But they take bits of crystal and melt it
9 in there to give you just a slightly more clear bottle.
10 That's the first thing we did.

11 The second thing we did was -- because this
12 is such a hard bottle to make, the defect rates were
13 really high. So our best day of production, four out of
14 ten bottles are no good, believe it or not. It is a
15 complicated bottle to make with heat and stuff like
16 that.

17 If it cools down too fast it cracks. The
18 base is heavier. There's a whole bunch of things. But
19 -- so on a good day, our best day, we get a four out of
20 ten, 40 percent rejection rate.

21 So what we have to do is we also have to
22 get -- hire teams of inspectors. So as they came off
23 the line and started to cool, we would have people pick
24 up bottles that were no good and stick it back in the
25 furnace to melt it down and start again.

1 So those are two really key things -- three
2 key things: Going to Slovenia, to an actual crystal
3 company, that was an added cost. Having crystal bits
4 added to the whole process, more money. Having to have
5 our own -- we call them -- reselection teams during
6 these times.

7 And then of course, because of this bottle
8 and the high defect rate, we can only make eight bottles
9 at a time -- bless you. We can only make eight bottles
10 at a time, whereas your standard bottle can make 32.
11 You know, a wine bottle, you can do the 32-bottle mold.
12 We can do eight if we're lucky. So it's a quarter of
13 the time as well. And time is money, unfortunately. So
14 it slows everything down.

15 Q. What is the average rejection rate for bottles in
16 the spirits industry?

17 A. So a standard bottle -- let's take the Grey Goose
18 bottle or something like that, where it's a very simple
19 shape bottle, probably about half a percent. We are
20 probably about 80 to 90 times higher defect rate than a
21 standard vodka bottle would have. And that's just on
22 our best day.

23 On our first day, while we are calibrating our
24 machines, you had 98 percent defect rate. It is all
25 going into the garbage.

1 But on the second day you're starting to get
2 something.

3 And then on the third day, we're rocking and
4 rolling at 40 percent. That's really -- that's our
5 goal.

6 Q. How many people on the assembly line are
7 dedicated to looking at the bottles for defects?

8 A. Where? At the glass --

9 Q. Yes.

10 A. -- or at the factory?

11 Q. At the factory?

12 A. Okay. Because we do actually have people at the
13 factory as well, because things slip by.

14 We usually have about -- teams of about --
15 because you can only do eight at the time, they are not
16 coming off as fast. It's not like an assembly line. We
17 will usually have about four or five people. As they
18 cool, they have these gloves because the glass is still
19 hot. They are doing these quick little inspections
20 checking it, looking up at the light, just in case.
21 Some stuff is very obvious where, you know, part of the
22 face is slid down a little bit or something like that.
23 That doesn't require much. Those get picked up
24 beforehand.

25 And then our secondary inspection is actually

1 done at the NLLC. Because we have so many people
2 touching this bottle. We have 32 hands touching this
3 bottle. So they've actually caught defects as well than
4 our reselection team hasn't. Some of them are pretty
5 bad defects, so...

6 Q. Okay. Can you tell all of us again, what is
7 NLLC?

8 A. It's the Newfoundland and Labrador Liquor
9 Corporation. They're a government owned still, the last
10 in North America. We chose them because they have
11 extremely high standards for testing. More than I think
12 any distillery I've ever seen. It literally tests every
13 batch of vodka. And we laser coat every single bottle
14 every day so we can track any issues. And they even do
15 sensory lab testing every single day. So that's why we
16 chose them.

17 Q. So NLLC makes the vodka?

18 A. Yes.

19 Q. And then it puts the vodka in the bottle?

20 A. They make the vodka to our recipe. So we came up
21 with the recipe and then -- as you know. And then we
22 provided some testing. And then they actually then do
23 the mixing of it.

24 Q. And they do all the packaging too; is that right?

25 A. Yes. Well, we -- everything is bottled there as

1 well.

2 Q. Does Crystal Head Vodka come in a box?

3 A. It does.

4 Q. And now NLLC put the bottle in the box?

5 A. They do.

6 Q. And any other kind of wrapping that goes on the
7 outside, they do that as well?

8 A. Correct. Even gift sets.

9 Q. Now, going back once again. You started December
10 of 2007. When would you say that you had a bottle that
11 was ready for production of your vodka?

12 A. So the bottle itself -- we made those
13 modifications pretty quick, because we knew what we
14 wanted.

15 So by January we had the prototype changes. And
16 then we just have to go to Bruni to get it now made.

17 So the basic mold itself was made. Which is
18 where most of the cost is -- not most of the cost, most
19 of the time is.

20 So we were ready to have bottles land in
21 Newfoundland probably I want to say April-May. Took
22 about three months to make 30,000 bottles.

23 Q. When you say May, you are talking about 2008?

24 A. 2008, May.

25 Q. So in 2008 you had a bottle?

1 You have to say yes.

2 A. Correct, yes.

3 Q. In 2008 you had a vodka?

4 A. We did.

5 Q. In 2008 you had a marketing plan?

6 A. We did.

7 Q. And in 2008 you had a box?

8 A. We did.

9 Q. What next?

10 A. Then it was time -- we also had an importer.

11 Then it was time to launch.

12 Q. When was Crystal Head Vodka launched?

13 A. It was launched September 23, 2008, in Anaheim at
14 the House of Blues.

15 Q. Okay. Was that an important event?

16 A. It's huge.

17 Q. Okay. And why is it huge?

18 A. Well, it's your first impression, right. Like
19 you. It's like people, you only get one chance to make
20 a first impression.

21 So this was our first time that we are going to
22 launch a bottle that no one had ever seen before. Like
23 it wasn't just another vodka or a tequila or a rum.
24 This was something that was going to be a game changer.
25 It took glass making on a commercial level to a new

1 level. There was nothing even close to this before. So
2 it was a big deal for us.

3 In our launch we had some trade media there. We
4 had Dan. We had the distributor sales force in
5 California there. So we had about 200 sales people. We
6 also -- we had about a dozen trade media as well. And
7 then we also had a couple of key retail accounts there
8 as well. Because you want to make them feel like they
9 are part of something before anybody else. So that's
10 what we did.

11 And then we got up on stage and we presented our
12 vodka. On -- when I say present, you know, Dan went up
13 on stage. I think I got to introduce him. Dan went up
14 on stage and he started talking about the vodka.

15 This is what our vodka is. This is why you
16 should buy it. These are the great things about our
17 vodka. This is what no one else is doing. And it was
18 huge. And it went viral. It literally went viral.

19 Q. What do you mean by that, it went viral?

20 A. Well, we had a very basic Website in 2008. None
21 of us are huge really -- none of the partners. Like I'm
22 considered high tech in our partnership, which is a
23 little scary. But we had a Website with a web design
24 company called Mind Blossom. And in the first four
25 days, since we -- when we launched it, our site was

1 knocked out. It was down. And the reason why is just
2 too much traffic.

3 And Mind Blossom had told me that in that week we
4 had more hits on our website than Toyota, in that four
5 days. We had well over 100,000 hits. And it caused us
6 to have to reevaluate what our Website needed to be.
7 And that's when we kind of knew we had something pretty
8 exciting as well.

9 Q. You mentioned that at the launch -- first of all,
10 where in Anaheim was the launch?

11 A. House of Blues.

12 Q. House of Blues.

13 And why was the House of Blues chosen?

14 A. The House of Blues, as we said before, Dan
15 Aykroyd is one of the cofounders of the House of Blues.
16 And it was a great venue. They are these big music
17 halls. Some of them are pretty cool actually. It's a
18 great venue to launch. You know, you got music. You've
19 got vodka. The owner is well known. You can house
20 hundreds of people. It was great way to introduce it.

21 Q. Now, so you've launched in Anaheim?

22 A. Correct.

23 Q. One city in one country. What comes next?

24 A. Well, we knew we had something pretty big. On
25 the way home from Anaheim to L.A., we found out that

1 there was one store called Hi-Time Liquors, which is a
2 well-known, independent store. And they were the first
3 people to get Crystal Head. And they actually bought a
4 whole pallet, which was insane. Like could you imagine
5 buying 50 cases of \$50 vodka for one store? You just
6 don't do that. They did.

7 And Dan and I -- Dan and I -- remember, Dan, we
8 -- I can't say that.

9 We went on the way home and we saw the display.
10 And Dan came by and shook everybody's hand and signed a
11 few bottles, which is where we got the idea of this
12 bottle signing actually.

13 Thank them for their business. They showed us an
14 ad they'd taken out in Orange County Magazine that we
15 didn't even have to pay for. And that was our very
16 first, I guess, sales call. And then we made plans to
17 do five more cities for October.

18 Q. And would it be fair to say you did many more
19 sales calls?

20 A. Oh, yes.

21 Q. What were those five cities that you went to
22 after Anaheim?

23 A. So we did Orlando. No actually we did six, I
24 guess. I'm not good at -- I should be good at math. We
25 did Orlando/Miami. I count that as one. Orlando/Miami.

1 Then we did New Orleans. Then we did Dallas/Houston.
2 And then we ended in Las Vegas. I want to say
3 October 29th or 30th.

4 Q. So that was all over a period of about -- I'm
5 better at math -- six weeks?

6 A. Well, we had to take a break first because now we
7 knew -- like this thing -- you have to understand, our
8 whole year's production we thought for all of North
9 America was going to be 5,000 cases. 30,000 bottles.

10 After that launch, after it went viral. After
11 the response we got from retailers and people, we
12 quickly realized we had a tiger by the tail. We had to
13 do something and we had to start planning. We just
14 couldn't hop -- so we needed two weeks to try to get
15 ourselves together.

16 And so in two 2 weeks we started, I think, I want
17 to say, October 8th and we ended on the 29th.

18 Q. How long did it take you to sell out those
19 5,000 cases?

20 A. Nine days. And we could have sold more. But we
21 limited everybody to just one bottle. We had people
22 wanting to buy cases.

23 We sold out before we even got to Las Vegas.
24 There was only 50 cases left. And Lee's Liquor, which
25 was a retailer there, bought all of it. And then

1 rationed it out as Dan would sign them.

2 Q. So you talk about going to these other cities,
3 and you talk about launching in these other cities.
4 What did that entail?

5 A. They are very long days, actually. There is a
6 cost as well. We decided to go by bus. Because it was
7 the most efficient way to move us all through there
8 quickly. No airport issues. You know, we did have
9 alcohol. You don't have to go through all that stuff.

10 So we had to get buses, rent buses. And what we
11 would do is, we had to get a PR company involved as
12 well, because we are moving.

13 And what we do is -- our days would start pretty
14 early actually. We'd usually start -- we'd hit a big --
15 we'd hit two radio stations. Usually we'd hit the two
16 biggest radio stations, usually a rock and roll one, and
17 a talk radio one or a pop or a rock and roll.

18 We'd start that at 7:30 in the morning. Dan
19 would either go in or he'd call in from the road,
20 wherever we could manage it. And then we'd go to the
21 distributor later that morning by about 9:30,
22 10:00 o'clock. We'd meet the entire sales team. We'd
23 do a whole product launch there with the sales team,
24 with Dan. He'd then sign bottles for them, take
25 pictures with them.

1 The Infinium person, along with myself or another
2 one person on our team would then give them some
3 incentive programs as well right away so we could make
4 sure we got the distribution out.

5 Then we'd usually have to have lunch with -- like
6 a key retailer in that area, you know. So we'd usually
7 have lunch with them. Then we'd have maybe half an
8 hour, hour break. Then we'd go to this crazy bottle
9 signing that was supposed to last two hours but it never
10 lasted two hours. It was always like four hours or
11 more. Because people didn't just bring bottles, they
12 brought DVD's. They brought Ghost Busters. They
13 brought everything. And Dan signed every single one of
14 them. And shook everyone's hand. And took pictures
15 with everybody. And that's why it took four hours
16 instead of two.

17 And then after that we'd usually get back to our
18 hotel which we had not seen yet. We'd wash up. We'd
19 have to change. And then we'd have to have dinner with
20 another customer or we'd have it with the owner of the
21 distributorship.

22 And then after that was done, we always had to
23 hit two or three night clubs, you know, to build some
24 relationships. It's all part of the relationship
25 building. Even if we didn't have product -- that much

1 product to sell, we have to still do it, because that
2 was going to come back later on.

3 So that was our typical day. Then we'd hop on
4 the bus. We'd sleep. We'd hop on the bus, drive a few
5 more hours and get to the next city.

6 Q. Who was driving that bus?

7 A. We had a driver. But Dan does like to drive.
8 Drivers can only drive so many hours in a day. And
9 sometimes we'd have to make up a lot of time. So Dan
10 would put on the driver's hat. He'd be driving this big
11 bus.

12 Q. Now, we talked about maybe five or six cities
13 after Anaheim. Was that all the cities you ever visited
14 in that bus?

15 A. No. So we ran out of product by the end of
16 October, as you know, just for those five cities. And
17 what happened was is -- we had to get more bottles made.
18 And bottles take a long time to make, especially when
19 they're made in Europe.

20 And like I said, the defect rates, only making
21 eight at a time versus 32. The earliest we could get
22 bottles was February 2009.

23 So what we did between the end of October and
24 February was, we didn't stop. We had to continue doing
25 what we were doing. Because the last thing you want to

1 do is have this great big splash and then go dormant, go
2 dark for four or five months and then you have to start
3 everything back. We had some momentum. So we continued
4 to do things. We didn't have much product though.

5 We did continue to do media. A lot unpaid -- Dan
6 was able to get a lot of unpaid media. So that
7 continued throughout.

8 We still visited distributors to make sure. We
9 still did shows, you know, to make sure that when we did
10 have the product we were ready to go. And by
11 February 2nd -- because I was doing it -- we had a
12 42,000-case backlog before we even had -- ready to go
13 back into market. And you don't get 42,000-case backlog
14 by doing nothing for those four months. We just kept
15 going.

16 And then 2009 was our big year where we hit, I
17 want to say 65, 66 cities in about 25 or 26 states. We
18 got a more official Crystal Head bus with decals on it
19 and everything like that. I think we did about 118, 120
20 bottle signings. We were on the road well over a
21 hundred days.

22 Q. You've mentioned a couple concepts that I want to
23 ask you about. You mentioned unpaid media. What is
24 that?

25 A. It is actually the best type of media, in my

1 mind, because I run the dollars. I don't like to pay.
2 So I like it the best.

3 But it's actually -- it's media. It's articles.
4 It's radio. What Dan does. It's TV. It's things we
5 don't have to pay for. It's beverage journals. It's
6 NBC, Fox, Forbes.com where they're just talking about
7 our product. It's Howard Stern on the radio
8 interviewing Dan. It's Jimmy Fallon, Jimmy Kimmel, the
9 Today Show. These are all things that we were on and
10 did. And it doesn't get much bigger. We were in People
11 Magazine, I think in Life. There's a picture in Life
12 with Dan holding the bottle. So that's unpaid media.

13 Q. Did -- the celebrity of Dan Aykroyd, did it give
14 you access to unpaid media that you might otherwise not
15 have had?

16 A. Yeah. So as you can imagine -- I don't know how
17 you put a value --

18 THE COURT: Excuse for a moment, but I think
19 the witness answered the question yes.

20 Did you have another question?

21 BY MR. FAY:

22 Q. Was that important to you to have that access to
23 unpaid media?

24 A. Yes. Extremely important. It's every brand
25 owner's dream, because, you know -- I think in the

1 18 months when we started we had over 3,000 unpaid
2 media. Like between articles, interviews, TV, radio,
3 bloggers. Like 3,000. We had a book. It looked like
4 an encyclopedia. It's super important. Because how do
5 you put a value on that? In order to get that exposure,
6 you'd have to actually pay someone, or pay to get in an
7 ad or things like that. Not only is it unpaid media not
8 paying, it's a third-party endorsement.

9 So it's not like -- you know, in an ad, of
10 course, it's going to be great, that ad. We did it. We
11 paid for it. Why would we put something negative?

12 In this case, you have somebody else giving their
13 opinion. And it's usually positive. And in our case,
14 it was always positive.

15 Q. You also mentioned the concept of trade media.
16 Why don't you explain to the jury what that is.

17 A. Like most industries, you know, you have your
18 consumers and you have your trade. Whether you're in
19 software engineering or anything like that. You have
20 your software publications that only software guys read
21 or programmers read.

22 Just like us. We have our trade media. Stuff
23 like Imbibe Magazine, which is great for bartenders and
24 some of the trade. Or Business [sic] Industry News, the
25 BIN magazines. Those are read by distributors and

1 wholesalers. Those are the things that -- that's how
2 the trade learns about things before the public learns
3 about things -- or learns about some of the challenges
4 or whatever before the public does.

5 So we hit a lot of trade. The first step is
6 usually trade media. And then you want to move into
7 consumer media. And we did both. We did a combination
8 of both. Obviously in the four months that we were out
9 of product, we picked more trade media because you
10 really don't need the consumer to go out there and not
11 be able to buy the product. So we did focus more on
12 interviews with Dan and on the trade.

13 But we very quickly moved into consumer media,
14 which is, you know, TV and things like that.

15 Q. You used an acronym BIN. What does that stand
16 for?

17 A. Business [sic] Industry News. So every state has
18 their version of a business industry news that the
19 distributors get and read.

20 And what it does is, they vary, different states.
21 But the BIN basically -- they publish -- so the
22 retailers get this. And they're from the distributors.
23 The distributors get it too. It literally publishes
24 every single product at the price point, the wholesale
25 price point for retailers to then go and order.

1 So they can see what distributor represents that
2 product, what the deal is that month on that product, on
3 that flavor, on that site, everything, and the price,
4 and then can go and order it.

5 And you can advertise on BIN. And that's a great
6 way to get to the retailers and bars and restaurants
7 under new products or something. Because, you know, if
8 you are a bar manager or something, you always want to
9 see what's new or -- especially if you're in a nightclub
10 or a food retailer. They want to be on top of their
11 game.

12 They'll look in the new product section. They'll
13 look at some ads. They really don't need to look at the
14 price book. They probably know it already. Or their
15 distributor sales person is stopping by during the week
16 anyways. But that's really key is, you know, to look at
17 the new products. And it gives them ideas. And that's
18 important too. So BIN was a key thing. And if you see
19 on our media list, we hit every single BIN in almost
20 every single state.

21 Q. Now, getting around to the 65 cities that
22 visited, did you take the bus?

23 A. I took of it some of the times. I like to fly.
24 Not that I don't like a lot of time with my partners,
25 but also I sometimes go in there and set up in advance.

1 There's lot of setup you have to do before you go into a
2 bottle signing. Like people think you just kind of show
3 up and everything is ready. There's so much --

4 THE COURT: I think the witness has answered
5 the question.

6 Another question, please.

7 BY MR. FAY:

8 Q. Over the course of your visit to the 65 cities,
9 do you have an estimate of how many bottles Mr. Aykroyd
10 signed?

11 A. I would say well over a hundred thousand.

12 Q. And today, all way up to today, how many bottles
13 do you estimate Mr. Aykroyd has signed?

14 A. A good quarter million.

15 Q. Do you have an estimate of how many times
16 Mr. Aykroyd has appeared on radio or on TV in support of
17 this product, Crystal Head Vodka?

18 A. Hundreds. Hundreds. Like we have over 4- or
19 5,000 media on this since the beginning, like unpaid
20 media. It's huge.

21 Q. Mr. Aykroyd is very into his product, correct?

22 A. Yes, he is.

23 Q. Now, you have been to 65 cities, you have a lot
24 media hits. Could you stop?

25 A. Oh, no, we can't stop. No.

1 Q. So after that, what have you done with Globefill
2 to continue to promote and market Crystal Head Vodka?

3 A. So we still do bottle signings. But we also
4 do -- some of the things I said before. We constantly
5 are working with our distributors and our importer to
6 make presentations to big retail chains, to bars,
7 restaurants. We have things like AMC Theaters. We're
8 involved in those presentations. We're always
9 developing specialized programs for our sales people to
10 execute on. We've hired brand ambassadors to make sure
11 that we constantly are educating accounts, so they know
12 exactly what our product is.

13 You know, there's 700 vodkas in the market. Why
14 buy us? Right? Like, you need to differentiate
15 yourself. You need to taste people. So we do tastings,
16 educational seminars. The constant incentive programs.

17 Danny just did something six days ago in Florida.
18 At the strawberry festival he did two events. So it
19 doesn't stop. And it can't, because no other brand
20 stops.

21 Q. Okay. How about trade shows? Do you go to trade
22 shows?

23 A. We do trade shows.

24 Q. Can you give me some examples of trade shows you
25 go to?

1 A. So there's two types of trade shows. There's the
2 actual trade shows that are just to the trade. Those
3 are holiday buying programs, you know, things like that.

4 And then there's consumer shows where they get to
5 taste it. And you guys are probably more familiar with
6 the consumer trade shows in your industry yourself.
7 Probably do your own trade shows as well. So it's a
8 combination of both we'll do. You know, we'll
9 probably -- right now about a hundred trade shows I'd
10 say, between the different states. Holiday programs,
11 non-holiday shows. Trade, consumer, bartender shows,
12 you name it, probably done about a hundred, maybe even
13 more.

14 Q. How about social media? Is Globefill active on
15 social media?

16 A. Yes. We are very active on social media. We
17 have an actual dedicated person just for social media.

18 Q. Do you do any specials through the year?

19 A. Yes. So like a lot of successful brands, I would
20 say, we make sure we do programs at specific times of
21 the year. So Christmastime is always big. So we will
22 do special gift sets with a gift with purchase in there,
23 whether it be a shaker, something most of you are
24 familiar with. You'll see them all over the place at
25 Christmas. Most of the big brands will do something

1 like that. We do participate in that. And we have for
2 years.

3 We'll do stuff at Father's Day. We'll do some
4 little extra stuff. Of course we'll do stuff at
5 Halloween because that is the beginning of the busy
6 season in our industry. And so it does give us an
7 opportunity to get ahead of Christmas and get in there a
8 month or two before some of the bigger brands do.

9 Q. Have you aggressively promoted Crystal Head Vodka
10 here in the Southern Cal area of the country?

11 A. Well, yeah. It was the first place we launched.

12 But Southern California is probably the
13 largest -- on a per-state basis, it is by far the
14 largest vodka market and luxury premium vodka market.
15 And even luxury spirit market I would say. In the
16 United States if not the world.

17 So we chose this to be one of our grounds. Our
18 own importer is based in Southern California. Our best
19 sales are in Southern California. Always have been.
20 From day one, California has been our number state in
21 sales in the entire United States. Every year, every
22 quarter.

23 Q. Okay. Let's try to break this down a little bit.
24 Since the launch in September of 2008, how many times
25 would you say Globefill has contacted, met with

1 distributors of Crystal Head Vodka?

2 A. Well, with Infinium, we like to go through the
3 hierarchy. It's constant. We have two full-time people
4 here doing that all the time. We had brand ambassadors.
5 We have ourselves. We have Dan. Dan lives in Southern
6 California, so he's always doing things. Hundreds of
7 times. It's got to be hundreds.

8 Q. And how about restaurants and bars? Since the
9 launch in September of 2008, how many times would you
10 say that Globefill, someone from Globefill has gone to a
11 restaurant, a bar to promote your product?

12 A. It's got to be 3-, 4,000 accounts we've seen.
13 Maybe more.

14 Q. How about liquor stores -- or department -- I
15 mean, not department stores. Grocery stores. How many
16 times would you estimate that someone from Globefill has
17 gone and met with a liquor store owner or the manager of
18 a grocery store to promote Crystal Head Vodka?

19 A. In the entire U.S.?

20 Q. Yep.

21 A. I don't know what big retailer we haven't
22 visited. It's got to be about 8-, 900 stores, maybe
23 more. Like, you know...

24 Q. Okay. Thank you.

25 Now, Mr. Hemi, did Globefill do anything to

1 register its bottle, its skull-shaped bottle and protect
2 it against copies?

3 A. Yes, we did.

4 MR. FAY: Can we -- your Honor, Exhibit 700.

5 THE COURT: I would just ask Counsel, how
6 much longer do you expect to be? You've been an hour
7 with the witness.

8 MR. FAY: Ten minutes, Your Honor.

9 THE COURT: Okay. Thank you.

10 BY MR. FAY:

11 Q. Mr. Hemi, do you recognize the exhibit we just
12 put up on the screen here?

13 A. Yes. That's one of our trademarks.

14 Q. When you say one, does Globefill have more
15 trademarks than this one?

16 MR. RAFFERTY: Your Honor, I object.

17 THE COURT: Sustained.

18 BY MR. FAY:

19 Q. What is your understanding of the purpose of this
20 trademark?

21 A. This is a trademark for alcoholic beverages for a
22 skull bottle. The shape of a skull bottle.

23 Q. Is protecting Globefill's interests in that
24 skull-shaped bottle, is that important to you?

25 A. It is extremely --

1 MR. RAFFERTY: Your Honor, I object. This
2 is completely leading.

3 THE COURT: Sustained.

4 Counsel suggested the answer in your
5 question.

6 BY MR. FAY:

7 Q. When you look at this trademark, Mr. Hemi, what
8 do you think?

9 THE COURT: What do you think?

10 BY MR. FAY:

11 Q. What do you think about this trademark?

12 THE COURT: Could you ask another question,
13 please.

14 BY MR. FAY:

15 Q. Why did you obtain this trademark?

16 A. We obtained this trademark and others just
17 because we need it.

18 MR. RAFFERTY: Your Honor. We are now well
19 past what's reasonable.

20 THE COURT: Sustained.

21 Answer will be stricken. Jurors are
22 admonished to disregard.

23 BY MR. FAY:

24 Q. Let's talk about this one.

25 A. Sure.

1 THE COURT: If you ask a question the
2 witness may be able to answer it without falling into
3 areas that would be objectionable.

4 BY MR. FAY:

5 Q. Why did you obtain this trademark?

6 A. We obtained this trademark to protect our rights
7 and our bottle rights. It was very clear early on
8 that --

9 MR. RAFFERTY: Your Honor, we are getting
10 speeches and not answers.

11 THE COURT: I would sustain the objection.
12 The witness tends to go beyond the question. But that
13 might be because counsel is not controlling the
14 question.

15 BY MR. FAY:

16 Q. Okay. Just tell us why you got this trademark.

17 THE COURT: And I think witness has answered
18 that question. Is Counsel not satisfied with the answer
19 given?

20 MR. FAY: No. That's fine, Your Honor. We
21 can move on.

22 BY MR. FAY:

23 Q. Has Globefill taken actions over time to protect
24 that trademark, that trademark that we just looked at?
25 Just say yes or no.

1 A. Yes.

2 Q. Did Globefill take actions to protect that
3 trademark by filing this lawsuit?

4 A. We did.

5 Q. Prior to filing this lawsuit --

6 MR. RAFFERTY: Your Honor, I object. There
7 is no trademark at issue in this lawsuit. That's
8 completely misleading for the jury.

9 THE COURT: The objection's overruled. But,
10 Counsel, try to keep your questions focused on the
11 issues here.

12 MR. FAY: Yes, Your Honor. We'll move on.

13 BY MR. FAY:

14 Q. Mr. Hemi, are you familiar with KAH Tequila?

15 A. I am.

16 Q. How did you first become aware of the existence
17 of KAH Tequila?

18 A. I first found out about a gentleman name Enrico
19 Caruso. We were at the Nightclub and Bar Show
20 March 2010.

21 Q. When did you first see a bottle of KAH Tequila?

22 A. Well, I first heard about it in March 2010 with
23 the Liquid Living Magazine.

24 I didn't see a bottle until months, months later.

25 Q. And what was your initial impression of the KAH

1 Tequila bottle?

2 A. It looked like our bottle. A cheaper version of
3 our bottle that was painted.

4 That's what it looked like to me.

5 Q. Did you take any action to address that -- that
6 feeling you had or that reaction you had to the bottle?

7 A. We did.

8 Q. You mentioned that you learned about it in March
9 of 2010 from a magazine. Right?

10 A. Correct.

11 Q. Can we put --

12 MR. RAFFERTY: I think that mischaracterizes
13 what he said.

14 THE COURT: That's always the problem when
15 counsel tries to characterize what the witness said.

16 Just questions now, please.

17 BY MR. FAY:

18 Q. Okay. When did you first learn about the KAH
19 Tequila bottle?

20 A. March 2010.

21 Q. And when did you first see it?

22 A. Got to be several months later -- I don't know
23 the exact month.

24 THE COURT: Let me ask, is Counsel asking
25 when did he first see the bottle; when did he first see

1 a picture of it?

2 MR. FAY: Well, that's what --

3 THE COURT: Wait just a moment.

4 THE WITNESS: I was going to say because --

5 THE COURT: Wait. Wait. Ask another
6 question.

7 BY MR. FAY:

8 Q. When did you first see a picture of the bottle?

9 A. In Liquid Living Magazine, the exhibit we have
10 here, March 2010 at the Nightclub and Bar Show.

11 Q. Was Liquid Living Magazine available at that
12 trade show?

13 A. It was.

14 Q. Was it handed out to people who attended that
15 trade show?

16 A. Yeah. Free copies.

17 Q. Was this the first time you saw either the actual
18 bottle or a picture of the KAH Tequila bottle?

19 THE COURT: "This" refers to?

20 BY MR. FAY:

21 Q. This magazine.

22 THE COURT: Ask the question again, please.

23 BY MR. FAY:

24 Q. Exhibit 618, this magazine. Was this the first
25 time you saw a picture of the KAH Tequila bottle?

1 A. It was.

2 Q. Okay. Can we go to the page?

3 And in this magazine, there was also an
4 advertisement for your product?

5 A. Correct.

6 Q. How did your advertisement get into this
7 magazine?

8 A. The editor in chief.

9 THE COURT: If he knows.

10 MR. RAFFERTY: Hearsay.

11 THE COURT: If he knows. Sustained. The
12 objection will be sustained.

13 BY MR. FAY:

14 Q. This -- these are two pages from that Liquid
15 Living Magazine. Right?

16 A. Correct.

17 Q. Okay. And on the right side is the Crystal Head
18 Vodka, correct?

19 A. Correct.

20 Q. On the left side -- who's that a picture of?

21 A. Kim Brandi.

22 Q. Can we go a little bit into the exhibit.

23 And if we look now, these two pages here,
24 Mr. Hemi, are these two additional pages from that
25 Liquid Living Magazine?

1 A. They are.

2 Q. And is this at least one of the pictures of the
3 KAH Tequila bottle you saw in this magazine on the
4 right?

5 A. It is.

6 Q. And is it your understanding that the editor in
7 chief and publisher of this Liquid Living Magazine was
8 the defendant Kim Brandi?

9 MR. RAFFERTY: Your Honor --

10 THE COURT: Sustained.

11 BY MR. FAY:

12 Q. Does Globefill have any issue with the sale of a
13 tequila by Elements or Ms. Brandi?

14 A. We do not.

15 Q. What is your issue?

16 A. My issue is she is using our bottle. It is a
17 skull-shaped bottle.

18 I have no problem with her selling tequila or
19 KAH. I just don't want it in our bottle.

20 Q. Have you been contacted in your role as the
21 managing partner of Globefill by people asking you
22 questions about KAH Tequila?

23 A. Yes, I have.

24 Q. And what kind of comments have you received?

25 A. General comments. You know, off-the-cuff

1 comments in the sense of, Oh, I heard about your new
2 tequila. Or, I love your new decorated bottles.

3 And that's immediately when I started saying, We
4 don't do a tequila. We don't have decorated bottles.
5 It is that type of stuff that we get.

6 We even had some people in the trade that have
7 seen KAH in an airport, for example --

8 MR. RAFFERTY: Your Honor. This is all
9 hearsay.

10 THE WITNESS: No.

11 THE COURT: Wait just a moment. I think it
12 goes beyond the question that's been asked. I'll
13 sustain the objection. And Counsel ask another
14 question.

15 MR. FAY: Your Honor, could we be heard on
16 that hearsay point?

17 THE COURT: No. Hearsay is allowed for
18 certain purposes. The Court realizes that.

19 MR. FAY: Right.

20 THE COURT: But I wants you to control the
21 witness more.

22 So ask the next question.

23 BY MR. FAY:

24 Q. So have people contacted you in the spirits
25 industry to say that they were confused about KAH

1 Tequila and Crystal Head Vodka?

2 A. Yes.

3 Q. And have people contacted and said that they
4 thought that KAH Tequila was a product that Globefill
5 made?

6 MR. MILLER: Your Honor, I'm going to
7 object. Not only hearsay, but leading again.

8 THE COURT: Quite leading. Sustained.

9 BY MR. FAY:

10 Q. All right. Has the introduction of KAH Tequila
11 into the marketplace impacted your business?

12 A. Yes, it has.

13 Q. And how so?

14 A. I would say it's impacted in several ways. I
15 believe there were some lost sales. I can't quantify
16 that. Unless you ask every person who bought a bottle.

17 THE COURT: We don't want the witness to
18 speculate. So he believes something --

19 THE WITNESS: I feel --

20 THE COURT: Wait just a moment, sir. But
21 apparently he doesn't really have evidence of that. But
22 I'm sure there are other witnesses that will be called
23 that will have that.

24 BY MR. FAY:

25 Q. Okay. Anything else?

1 A. Yeah. Lot of time and money went into this case.
2 We've had to ask favors of some of our retail friends to
3 make sure that we are not placed right beside KAH.
4 Instead of -- you know, instead of asking favors for
5 bigger displays, we have to ask to make sure that we are
6 not put next to them to create more confusion.

7 We've been limited in our ability to market our
8 product and the product line extend our products. If we
9 want to come out with a decorative bottle, that would
10 create even more confusion. So it completely puts us in
11 a hole. We can't expand our marketing or our portfolio.

12 And financially, you know, we have a small team.
13 And, you know, because of this, the cost of these cases,
14 our teams don't get the raises or bonuses that they
15 deserve. This year they're not going to get any raise
16 or bonus, nobody. And they work real hard. We are a
17 pretty tight group. And it is embarrassing.

18 Q. Do you want to put KAH Tequila out of business?

19 A. No.

20 Q. Once again, what do you want?

21 A. I just want them to stop using our skull bottle.

22 Q. Mr. Hemi, did the manufacture of KAH Tequila ever
23 sue Globefill in Mexico?

24 A. It did.

25 Q. Okay. And how did you first become aware of

1 that?

2 A. So our distributor in Mexico contacted our
3 importer there, Monarch, and informed us that our goods
4 were raided in his warehouse and our goods were seized.

5 Q. And to your knowledge, why were they seized?

6 A. They were seized because Elements, the KAH
7 Tequila people, claimed that having our product in
8 Mexico was infringing on them. And it would create
9 confusion and irreparable harm to their product if we
10 were allowed on the marketplace. So essentially the
11 same thing we are arguing here.

12 Q. What did Globefill do in response to that seizure
13 of this product?

14 A. We hired attorneys and provided the Mexican
15 government with a reason why we are there. And the main
16 reason was, we had a trademark in Mexico for our vodka.

17 MR. RAFFERTY: Your Honor, I object. You've
18 ruled on this. Here we go again.

19 THE COURT: The objection is sustained.

20 BY MR. FAY:

21 Q. Did that lawsuit end to your satisfaction?

22 MR. RAFFERTY: Your Honor, I object.

23 THE COURT: Sustained.

24 Motion in limine No. 2. Counsel is within
25 the scope of a motion that the Court has ruled upon.

1 MR. FAY: Thank you, Your Honor.

2 BY MR. FAY:

3 Q. Mr. Hemi, to bring it all together, have you
4 worked really hard to build this brand Crystal Head
5 Vodka?

6 A. Yes, we all have.

7 Q. You have a whole team there in Canada, correct?

8 A. I do.

9 Q. And you have employees here in the U.S.?

10 A. We do.

11 Q. And a few overseas?

12 A. Correct.

13 Q. And you have been at it now for how many years?

14 A. Nine years.

15 Q. And is that important to Globefill to protect its
16 brand?

17 A. Extremely important.

18 Q. Is that skull-shaped bottle an important part of
19 that brand?

20 A. It is, yes.

21 MR. FAY: Thank you. Pass the witness.

22 THE COURT: Cross?

23 MR. RAFFERTY: If I may, with your
24 permission?

25 THE COURT: Certainly.

1 MR. RAFFERTY: I would say 45 minutes at a
2 minimum.

3 THE COURT: I just want to make sure that we
4 can finish before we need to take another break.
5 Counsel may proceed.

6 **CROSS-EXAMINATION**

7 BY MR. RAFFERTY:

8 Q. Good afternoon, Mr. Hemi.

9 A. Good afternoon.

10 Q. My name is Tom Rafferty. I think we -- we met a
11 couple of days ago.

12 A. We did.

13 Q. Met a lot of people a couple of days ago.

14 You talked a little bit about this free
15 advertising that you got for free media, I think you
16 called it?

17 A. Yeah, unpaid media.

18 Q. Unpaid media. And one the magazines or
19 publications that you talked about was this BIN?

20 A. Correct.

21 Q. Am I correct that BIN is some of the more very
22 big, thick magazines that contain lots of whole page ads
23 from different producers?

24 A. Correct.

25 Q. Some of the BINs are 2-, 300 pages?

1 A. Yes. Some could be that many pages.

2 Q. You got this -- you were -- I think you said you
3 hit every BIN in every state?

4 A. I believe we hit almost every BIN, yeah.

5 Q. And is that typical for, you know, people trying
6 to promote their liquor brands to puts ads in the BINs?

7 A. Correct, yeah.

8 Q. So in any given BIN that you would have puts a
9 Crystal Head Vodka ad in, you would have expected to see
10 ads from your competitors?

11 A. Correct.

12 Q. The other vodka manufacturers?

13 A. Not all of them, but yes.

14 Q. And you would have also expected to see ads from
15 other kinds of alcoholic beverages by their
16 manufacturers or distributors?

17 A. Correct.

18 Q. So now you -- I want to clear up some things. I
19 understand you -- the vodka that Crystal Head includes
20 in its bottles is made from you said something, sweet
21 cream corn?

22 A. It's a variety of corn in Ontario. In Chatham,
23 Ontario, actually, which is a town. It's actually where
24 we get the corn from. It is called peaches and cream
25 corn.

1 Q. Peaches and cream corn.

2 What's tequila made out of?

3 A. Agave.

4 Q. Does tequila and vodka have the same taste?

5 A. No.

6 Q. Now, have you ever from time to time been
7 concerned that Crystal Head Vodka bottle is a novelty
8 item that people might actually go and buy once and then
9 never buy again?

10 A. No, I don't think so. No.

11 Q. You've never heard anyone at Crystal Head or
12 Globefill talk about the fact that there is a
13 possibility that people would buy the bottle once and
14 then just refill it?

15 A. With every unique bottle there is going to be
16 some type of group of people that collect bottles. But
17 at 10 million bottles, I don't think we are a novelty.

18 Q. Now you talked a lot about the market that you
19 were entering into when Crystal Head Vodka was launched.
20 And I think, if I remember what you said, you called it
21 a super premium market?

22 A. Super premium and luxury.

23 Q. And who competes with you in that market?

24 A. In which market?

25 Q. In the super premium luxury vodka market?

1 A. At the time I would say it would have been Grey
2 Goose. It would have been Stolli Elit. It would be
3 Belvedere. It would have been Ciroc. This is all at
4 the time. It would have been Roberto Cavalli, those
5 types of brands. Jean-Marc XO.

6 Q. Those were typically your competitors?

7 A. In that category.

8 Q. And the category being the vodka category?

9 A. The luxury category.

10 Q. So not just any vodka, but a luxury vodka?

11 A. Yeah. Luxury and super premium.

12 Q. And does Crystal Head Vodka have a preference for
13 where it likes its product to be placed in the sections
14 of a -- say a package store?

15 A. Yes, it does, definitely.

16 Q. Is part of it that you like to appear by the
17 other super premium luxury vodkas?

18 A. Not necessarily.

19 Q. Well --

20 A. I'd really prefer to be in high traffic areas.

21 Q. Do you also like to be next to Grey Goose, Ketel
22 One and Belvedere?

23 A. Because they're high traffic areas, yes.

24 Q. Okay. But by high traffic areas, you mean lots
25 of people buy those other vodkas?

1 A. Lots of people go right there. So you want to be
2 visible to that area.

3 Q. When you say "go right there," that's because
4 they're coming into the store and they know what they
5 want?

6 A. I don't know if they know what they want.

7 Q. But --

8 A. I just know that we want to be in high traffic
9 areas.

10 Q. So you'd like to be next to those high selling --
11 high volume selling super premium vodkas?

12 A. If it's high traffic, we want to be there.

13 Q. When you go into a package store or a liquor
14 store, depending on how you call it, there is usually a
15 vodka section; is that right?

16 A. Correct.

17 Q. And is there usually a separate section that the
18 tequilas are in?

19 A. Correct.

20 Q. And then a separate section for scotch whiskey
21 and...

22 A. Correct.

23 Q. And who decides where the bottles get placed in
24 these kinds of stores, the retail or the package stores?

25 A. Usually it's a no-brainer. Vodkas go with vodka.

1 Tequila goes with tequila. Ultimately it's the decision
2 of the retailer.

3 Q. When you say a "no-brainer," you mean it's just
4 common sense that the store puts the vodka in the vodka
5 section and the tequila in the tequila section and so on
6 and so forth for the have various different kinds of
7 alcoholic beverages?

8 A. That's how it's usually done, yes.

9 Q. You wouldn't normally expect to go into a store
10 and see vodka and tequila in the same section?

11 A. Unless it's a very small store, I wouldn't.

12 Q. You testified a little bit about when you first
13 learned that KAH was going to launch a tequila.

14 Did anyone at Globefill consider the possibility,
15 if you were concerned about confusion, of making a
16 public statement to say "That tequila has nothing to do
17 with us"?

18 A. We did actually think about it. But we decided
19 not to do it.

20 Q. So you expressedly thought about putting out a
21 public statement saying that "This tequila has nothing
22 to do with us" and you decided not to do it?

23 A. Correct. There's a reason why.

24 Q. Now, do the buyers of Crystal Head Vodka in your
25 experience have common sense?

1 A. I'm assuming they have common sense.

2 Q. Do you think they do?

3 A. I hope so.

4 Q. Have you ever told anyone under oath that you
5 believe that they did?

6 A. I can't remember. I'm sure I did.

7 Q. Now, the Crystal Head Vodka bottles. It's not
8 made from Slovenian crystal, is it?

9 A. No, sir. It's made in a Slovenian crystal
10 factory. Where we take bits of crystal and add it into
11 the glass-making process.

12 Q. But it's a glass bottle?

13 A. Correct.

14 Q. How do the customers of Crystal Head Vodka know
15 that the skull shape bottle they're buying isn't
16 actually a crystal skull shape?

17 It's called Crystal Skull [sic] Vodka?

18 THE COURT: Did --

19 MR. RAFFERTY: I'll withdraw it and try it
20 again.

21 THE COURT: I was going to ask if the
22 witness understood the question.

23 So the question's been withdrawn.

24 MR. RAFFERTY: The question must have been
25 bad then, Your Honor, so I'll try again.

1 BY MR. RAFFERTY:

2 Q. Have you ever given any thought to whether or not
3 customers might believe that the Crystal Head Vodka
4 bottle was actually a crystal bottle?

5 A. We've had people ask us that actually.

6 Q. Do you -- is there any way for a Crystal Head
7 Vodka customer, other than asking you, to figure that
8 out?

9 A. I don't understand.

10 Q. Well, the bottle is labeled Crystal Head Vodka.

11 A. Right.

12 Q. Is it crystal like Waterford crystal or is it
13 glass?

14 A. It's glass.

15 Q. How is it that a customer knows that they are
16 buying a Crystal Head Vodka bottle that's not actually a
17 crystal bottle?

18 A. Well, we don't state that it is not crystal. We
19 are assuming they know it's glass.

20 Q. And on what basis are you assuming they know it's
21 glass?

22 A. I just assume. It looks look a glass bottle. It
23 doesn't sparkle like a crystal bottle. We never really
24 thought about that.

25 We've had people ask us if it's a crystal bottle.

1 And always told them no, it isn't.

2 Q. It doesn't sparkle like a crystal bottle?

3 A. It doesn't.

4 Q. Now, you have given testimony under oath in this
5 case a number of times?

6 A. I would say so, yeah, couple times.

7 Q. Do you recall, as you sit here today, ever being
8 asked about how customers would be able -- whether they
9 would or wouldn't be able to figure out if the bottle is
10 crystal or glass?

11 A. I just don't remember.

12 MR. RAFFERTY: Can we put up 115.

13 THE COURT: Exhibit 115?

14 MR. RAFFERTY: We are putting up testimony
15 given by Mr. Hemi on the 25th of April 2013.

16 THE COURT: But is Counsel asking that it be
17 published?

18 MR. RAFFERTY: I'm asking --

19 THE COURT: You said to put it up.

20 MR. RAFFERTY: If there's an objection, we
21 can show it on counsel's screen first.

22 THE COURT: What's the reference, please?

23 MR. RAFFERTY: 115, line 7, through 115,
24 line 24.

25 THE COURT: So I'll ask Counsel to read that

1 section, if you have that, and advise the Court whether
2 you have any objection that that be published.

3 MR. RAFFERTY: I do, Your Honor.

4 THE COURT: You do object?

5 MR. RAFFERTY: Yes, Your Honor.

6 THE COURT: Then if it can be made available
7 to the Court, I will take a look at it.

8 MR. RAFFERTY: Can we put it on the Court's
9 screen?

10 THE COURT: Not yet.

11 MR. RAFFERTY: If Ms. Rettig could approach.
12 Your Honor, again, for the record, it's 115.

13 THE COURT: Line 7.

14 MR. RAFFERTY: Through 24.

15 And there are no objections to any of the
16 questions on the record.

17 THE COURT: This is the deposition of
18 Jonathan Hemi that the Court is going to review. The
19 date is April 25th, 2013.

20 Objection sustained. It may not be read.

21 MR. RAFFERTY: Thank you, Your Honor.

22 BY MR. RAFFERTY:

23 Q. Mr. Hemi, you spoke about some people who
24 contacted you at various points in time, during your
25 direct.

1 Are any of those people to -- did you take their
2 names when they contacted you?

3 A. Regarding?

4 Q. Well, the people who contacted you, that you just
5 testified to about confusion or alleged confusion, or
6 whether you had introduced a new tequila line, those
7 people.

8 A. Some of them I did, and a lot I didn't. It
9 depended on the comments.

10 Q. Are any of the people that you spoke to coming
11 here to testify to this jury about what you said they
12 told you?

13 A. Unfortunately not.

14 Q. Some you them you didn't even bother to take
15 their names?

16 A. No, some we didn't.

17 Q. That included some who allegedly contacted you
18 after you filed this lawsuit and you didn't take their
19 names?

20 A. Correct. When you are at an event, you can't
21 just take people's names.

22 Q. You could have asked them, couldn't you?

23 A. Not if you don't know them well. If you're at an
24 event and they make a comment like, Hey, I love your new
25 tequila; or, I saw your new bottles. And you have

1 hundreds of people around you. And I don't know them.
2 I can't just pull them aside and say, Can I take your
3 name and number. That's not reasonable.

4 Q. You never asked them that? You never asked,
5 would you be willing to come and help us?

6 A. No, I didn't.

7 Q. Now, you also said that there were several
8 iterations of the bottle after you got to Crystal Head
9 Vodka -- or to Globefill?

10 A. Correct.

11 Q. At some point you -- I think you deepened the eye
12 sockets?

13 A. Yeah. So when we got the bottle, it was pretty
14 much almost done. We just wanted to tweak it a little
15 bit to make it visually a little bit nicer.

16 Q. Did you consult with Mr. Alexander about that?

17 A. Yes. But it was very quick decision. So what we
18 did was we basically just outlined some of the things we
19 thought would work better for the product and go from
20 there.

21 Q. And you -- one of the other things you did at
22 that time was you chiseled the teeth so they were
23 actually dimensional?

24 A. No. They were already chiseled. So I just
25 wanted them a little bit more defined. But they were

1 always there.

2 Q. So when you say defined, if I'm understanding
3 you, what you wanted to do is to dig deeper into --

4 A. Really just the middle one we needed. So you had
5 the side. But the problem with glass making is as you
6 get in close with the blow mold, you lose some detail up
7 here. So I just wanted to make it consistent.

8 Q. Did you consult with Mr. Alexander about the
9 chiselling of the teeth?

10 A. Yes. It was a whole partnership call on this.

11 Q. Okay. And you're a partner in that partnership?

12 A. I am.

13 Q. What's your financial interest in the Globefill
14 partnership percentage-wise?

15 A. Oh, percentage. Ten percent.

16 Q. So you're a 10 percent owner of Globefill?

17 A. I am.

18 Q. Now, when Globefill launched the Crystal Head
19 Vodka, was there any reference to this legend of the 13
20 crystal skulls?

21 A. Yes, there was.

22 Q. And can you -- what was the legend of the
23 13 crystal skulls, as you understand it?

24 A. So the legend of 13 crystal skulls were basically
25 there were these 13 crystal skulls that were placed

1 around the world. Only eight were in mankind's
2 possession. I think five are missing. And the bottle
3 that we made, as Dan has said before and -- reminded him
4 of one of the -- one of the bottles of the Crystal
5 Head's that had been found.

6 And these Crystal Head's were said to have
7 healing properties, spiritual properties, and they were
8 used in ancient, you know, even in ancient Mayan and
9 Mesopotamia as guidance for the future, for healing,
10 things like that. That's my understanding.

11 Q. Okay. And that was part of the basis on which
12 Crystal Head Vodka was marketed, and is marketed through
13 this day, is in connection with the legend of the
14 13 crystal skulls?

15 A. Not today, no.

16 Q. You've stopped marketing on that basis?

17 A. We stopped very quickly marketing on that basis
18 because, you know, at the end of the day, it takes away
19 from what we really have, which is a skull-shaped
20 bottle.

21 We don't want to -- you know, we can talk
22 about -- those are just marketing. It's not -- it's
23 not -- it's really more than just the 13 skulls.

24 So quickly early on we actually changed the
25 website. We -- within a year we changed the website,

1 and we kind of started to get away from the legend of
2 the Crystal Head's.

3 Q. And when did that happen?

4 A. It's been about, I want to say, 2010 or late
5 2009. Once we started to redo our website then we --
6 the website had nothing to do with the Crystal Head's.

7 Q. Now, is it your understanding that Globefill's
8 position is that any spirit product sold in any type of
9 skull bottle whatsoever would be confusing with your --

10 A. It's my opinion -- it is my opinion that any
11 alcoholic beverage sold in a human skull-shaped bottle
12 would be infringing on our product.

13 Q. And that doesn't -- it doesn't make any
14 difference, in your view, as to the differences between
15 that -- that allegedly infringing bottle and the
16 Globefill bottle itself?

17 A. If it's in the shape of a skull, a human skull,
18 that's what our trademark is in. And -- and the rest is
19 just decoration. That's all it is.

20 You can paint my bottle, but essentially it's
21 still in the shape of a skull.

22 Q. If it's the same bottle?

23 A. Yeah. You can paint it, you can put jewels on
24 it, but it's still a skull bottle.

25 Q. And it's your opinion that the skull bottle in

1 your hands right now, the Globefill Crystal Head bottle,
2 is in exactly the same shape as the KAH Tequila bottles?

3 A. No, it's not exact. I've never said it's exact.
4 It's similar and it's in -- in my opinion, both bottles
5 are considered human skulls.

6 Q. But the KAH Tequila bottles, you say they're
7 similar. They're also different than the Crystal Head
8 Vodka bottle, aren't they?

9 A. Yes, there's differences as well. Yes.

10 Q. Can you -- can you discern the differences by
11 looking at them?

12 A. Well, sure.

13 Q. Okay. Do you think that an average customer
14 could discern the differences by looking at the
15 bottles?

16 A. That they're different?

17 Q. That they're different.

18 A. Yes, I think they could tell that they're
19 different.

20 Q. Now, do you know whether Globefill actually had a
21 trademark on its Crystal Head Vodka bottle prior to the
22 time it sued Elements and Kim Brandi?

23 A. Do I know?

24 Q. Yes. Do you know?

25 A. Yes.

1 Q. You believe that Globefill had a trademark that
2 had issued on the Crystal Head Vodka bottle prior to the
3 time that you brought this lawsuit against Elements and
4 Ms. Brandi?

5 A. We did. We had four trademarks starting in 2006
6 we started filing.

7 Q. Did you have a trademark on the bottle?

8 A. We had applied for trademarks on the bottle.

9 Q. I'm not asking if you applied for them, sir. I
10 asked you if you had a trademark on the bottle that was
11 in force at the time that Elements and Ms. Brandi was
12 sued by Globefill?

13 THE COURT: And let me ask the witness, do
14 you understand the question that's being asked?

15 Yes or no.

16 If you don't, I'll have counsel rephrase.
17 If you do, you may answer.

18 THE WITNESS: Could you rephrase that?

19 THE COURT: Do you not understand the
20 question as phrased?

21 THE WITNESS: Well, I think --

22 THE COURT: All you have to say is yes or
23 no. Do you understand the question?

24 If you do, you have to answer it. If you
25 don't, then I'll have counsel rephrase.

1 THE WITNESS: I believe I understand it. I
2 just don't want to get it wrong because I'm a little
3 confused about -- can I --

4 THE COURT: Counsel, state the question
5 again, please.

6 Listen carefully, sir.

7 THE WITNESS: Okay.

8 BY MR. RAFFERTY:

9 Q. At the time that this lawsuit was filed --

10 A. Okay.

11 Q. -- back in 2010, was there an issued trademark, a
12 trademark in force, on the Crystal Head bottle itself?

13 A. No. We had just -- we filed, but I don't think
14 we had it. It wasn't -- what's next stage? It
15 wasn't -- it was registered but it wasn't in force yet.

16 Q. It hadn't issued, had it?

17 A. We had registered it.

18 Q. You filed for a trademark, but you didn't get it
19 yet?

20 A. No. But it takes time to get a trademark.

21 Q. Right. When did you file for the trademark in
22 connection with the date that this lawsuit was filed
23 against Elements and Kim Brandi?

24 A. Our first trademark?

25 Q. Yes -- no. The trademark on the Crystal Head

1 bottle.

2 THE COURT: That's the subject of this
3 lawsuit.

4 BY MR. BERG:

5 Q. That's the subject of this lawsuit that's sitting
6 on the table in front of you.

7 A. Our very first one was in 2009.

8 Q. No, I'm asking you for the trademark that's on
9 that bottle. When did you file for it?

10 A. Can I ask a --

11 THE COURT: If you don't understand -- no,
12 you can't ask. But if you don't understand the
13 question, you can say you don't understand it.

14 THE WITNESS: My understanding of this
15 question is that we have had -- we had trademarks for
16 the bottle starting in 2009.

17 BY MR. BERG:

18 Q. Okay. So -- so stop right there. If that -- if
19 you want to finish, go ahead.

20 A. That's -- that's my understanding. Of the
21 trademark that I was shown, that was done in 2010, which
22 was after we saw the KAH bottle.

23 Q. And after you sued Ms. Brandi?

24 A. It could have been after. It was after we saw
25 the KAH bottle.

1 Q. Okay. At the time you sued Ms. Brandi, you
2 didn't actually have the trademark on the bottle itself,
3 you -- you know that?

4 A. We didn't have the trademark I was shown.

5 MR. FAY: Objection, Your Honor. This is
6 badgering.

7 THE COURT: Overruled.

8 There's an exhibit number.

9 MR. RAFFERTY: There's an exhibit --

10 THE COURT: Wait.

11 MR. RAFFERTY: -- in --

12 THE COURT: Wait. Wait.

13 MR. RAFFERTY: -- 700.

14 Why don't we put it up on the screen if the
15 witness --

16 THE COURT: Wait. Wait just a minute.

17 The witness was shown an exhibit. It has an
18 number on it. I think that is what he is referencing.
19 So counsel may refer to that exhibit and ask the
20 question that you wish to ask of the witness.

21 MR. RAFFERTY: It's always a problem when I
22 get around technology.

23 Q. Okay. This is the exhibit that you're referring
24 to?

25 A. Correct. This particular trademark, correct.

1 Q. And this is a trademark that's for alcoholic
2 beverages, namely vodka, in Class 33?

3 A. Correct.

4 Q. Okay. And it was filed on March 24, 2010.

5 A. Correct.

6 Q. Was that before or after you sued Ms. Brandi and
7 Elements?

8 A. If it -- if it -- I think it was just after we
9 sent a cease and desist letter.

10 Q. You sent the cease and desist letter on
11 March 18th?

12 A. I believe we sent it -- yeah, I believe we sent
13 that before we had this one registered.

14 Q. Right. And then you sued four days later on
15 March 22nd?

16 A. I don't know the exact date.

17 Q. Okay. But this registration came after that.

18 MR. FAY: Objection, Your Honor.
19 Mischaracterizes the testimony.

20 THE COURT: It's a question. It's
21 cross-examination. Overruled.

22 THE WITNESS: Say --

23 THE COURT: Do you have the question in
24 mind, sir? Or would you like --

25 THE WITNESS: Can you say it again?

1 MR. RAFFERTY: Oh, certainly.

2 Q. This trademark was applied for after you had
3 already sued Elements and Kim Brandi for allegedly
4 infringing the trade dress on your bottle?

5 A. Correct.

6 Q. Thank you.

7 THE COURT: And just for the jury, this is
8 Exhibit 700. And this exhibit is in evidence.

9 MR. RAFFERTY: Your Honor, I'll pass the
10 witness to Mr. Miller, if he has questions. Otherwise,
11 thank you Mr. Hemi for your time.

12 THE WITNESS: Thank you.

13 THE COURT: Mr. Miller.

14 MR. MILLER: : Very little, Your Honor.

15 THE COURT: It's cross.

16 **CROSS-EXAMINATION**

17 BY MR. MILLER:

18 Q. Good afternoon, sir.

19 A. Hi, how are you?

20 Q. I'm doing all right.

21 I'd rather be sailing. But thank you for asking.

22 A. Wouldn't we all.

23 Q. What was the best year for sales in terms of
24 sales volume for Crystal Head?

25 A. What was our last year's sales?

1 Q. Best year for your sales.

2 A. Best year sales would be either 2011 or 2012.

3 I'm not a hundred percent sure.

4 But the U.S. you're speaking specifically?

5 Q. Yes.

6 A. I want to say 2011.

7 Q. All right. So -- so the first full year that KAH
8 is being sold in throughout the United States, that was
9 your best year?

10 A. It was our best sales year.

11 MR. MILLER: No further questions. Thank
12 you.

13 THE COURT: Redirect?

14 MR. FAY: Yes. Very briefly, Your Honor.

15 **REDIRECT EXAMINATION**

16 BY MR. FAY:

17 Q. Mr. Hemi, do you remember when counsel asked you
18 about --

19 THE COURT: Let's don't ask him if he
20 remembers. Just ask the question that you have in mind.

21 BY MR. FAY:

22 Q. Were you asked a question by counsel about --

23 THE COURT: Not was he asked a question.

24 Just what's your question.

25 BY MR. FAY:

1 Q. Did you decide to make a public statement about
2 KAH Tequila?

3 A. No.

4 Q. Okay. Was there a reason why you didn't make
5 that statement?

6 A. Yes. There is a couple of reasons.

7 Q. Okay. Can you explain?

8 A. The first reason is, is we felt by mentioning KAH
9 in the -- in our press release, it would only advertise
10 their product more.

11 Traditionally, big companies will not add
12 competitor products names to their press release.

13 And then the second reason is if it's not picked
14 up properly. So on the media wire, sometimes they'll
15 pick up snippets of it. They don't produce the whole
16 press release. And you'll see that all the time,
17 especially in digital marketing.

18 It may actually create more confusion with
19 people. It may end up coming out by saying that we --
20 we are KAH Tequila. Or it could come out completely --
21 completely wrong. So those were the two main reasons.
22 So we definitely had to stay away from that.

23 MR. FAY: Okay. Thank you.

24 THE COURT: All right. May this witness be
25 excused?

1 No objection by the defense?

2 MR. RAFFERTY: No objection by the defense.

3 THE COURT: Plaintiff?

4 MR. FAY: Yes, Your Honor.

5 THE COURT: If the jurors have any questions
6 about this witness' testimony -- since I will be
7 excusing the witness, he may not be able to you, this
8 would be the time to write those questions down and
9 submit them to the clerk.

10 So I think there are no questions.

11 The witness maybe excused. You're free to
12 leave, sir. Thank you.

13 THE WITNESS: Thank you.

14 THE COURT: We were hoping to complete those
15 two witnesses today, and so we've accomplished that. So
16 I'm prepared to excuse the jury for the day.

17 So unless there's something that counsel
18 wish to raise with the Court that might involve the
19 jury, I will be excusing the jury at this time.

20 Nothing?

21 MR. HUMMEL: Nothing.

22 MR. FAY: Nothing, Your Honor.

23 THE COURT: All right. So you are excused.

24 Now, tomorrow is a short day for us. But I
25 would like to start at eight. But I do now that eight

1 may be difficult for some of you, so I need to know that
2 now, and I can then try to adjust the time.

3 So I'm just asking the question, is eight
4 still convenient for all the jurors?

5 If anybody thinks it's not, you can either
6 speak to the clerk about it or tell me now.

7 I think most of you were here probably at
8 eight. But I know --

9 A JUROR: Eight is fine.

10 THE COURT: So there's no one that's
11 objecting to our starting at eight.

12 All right. So 8 o'clock tomorrow is the
13 return time. Remember the admonitions that have been
14 given not to do any research, consult materials or
15 social media, or try to learn more about the case.

16 Everything that you will need to know about
17 this case in order for you to make the findings of fact
18 that are relevant so that you can apply the law that I
19 will give you will be given to you in this courtroom.
20 So it is not necessary for you to go outside of the
21 evidence here to try to learn more.

22 Jurors are excused. And we'll see you
23 tomorrow morning at 8 o'clock.

24 THE CLERK: Please rise.

25 (JURY EXITS THE COURTROOM.)

1 THE COURT: You may be seated.

2 Jurors have been excused. I know there are
3 some matters -- I believe there are -- that we need to
4 discuss that may be important for tomorrow: examination
5 of witnesses and use of exhibits.

6 But we also need to discuss Tuesday, because
7 there won't be an opportunity for you to meet with the
8 Court before the 8 o'clock session on Tuesday.

9 I'm prepared to take a short recess about
10 15 minutes, give everybody a little break. During this
11 time, counsel might meet and confer just to see are
12 there differences among you and can you resolve those.
13 And I will return to the bench and you will be able to
14 indicate to me the witnesses for tomorrow, or at least
15 the one witness that we thought, but possibly a second;
16 the exhibits to be used; and also a list of witnesses
17 for Tuesday and the exhibit to be used.

18 So we're in recess for about 15 minutes.

19 THE CLERK: Please rise. Court is in
20 recess.

21 (BREAK TAKEN.)

22 THE CLERK: Please rise. Come to order.
23 This Court is again in session.

24 THE COURT: Thank you. You may be seated.

25 So we can go off the record just for a

1 moment.

2 (OFF THE RECORD.)

3 THE COURT: All right. We can go on the
4 record. So general things to be discussed, but
5 specifically let's talk about tomorrow's witnesses and
6 the exhibits. If you have already taken care of that
7 and there are no issues for me to resolve, then you just
8 might identify the who and the what, and then the same
9 for Tuesday. So we'll start there.

10 MS. BIVENS: Your Honor, tomorrow we, the
11 plaintiff, plan to present Christina Cappellini and
12 David Brown.

13 THE COURT: Okay.

14 MS. BIVENS: And the parties -- correct me
15 if I'm wrong -- we have agreed to every exhibit except
16 for 1244 for Christina Cappellini.

17 MR. HUMMEL: Yeah, for Brown I think there's
18 no issues. For Christina Cappellini I think there's one
19 exhibit, and then there's some demonstratives.

20 THE COURT: So let's take Brown first.

21 Time estimate for the direct and cross.

22 MS. BIVENS: Thirty minutes for the direct.

23 Or --

24 MR. BERG: Oh, it won't be long.

25 Thirty minutes at most, Your Honor.

1 THE COURT: Okay. And similar amount of
2 time for the cross? Or --

3 MR. CASTORIA: Maybe a little bit shorter.

4 THE COURT: Okay. So I'll say same amount
5 of time, about 30 minutes.

6 MR. CASTORIA: Thank you, Your Honor.

7 THE COURT: And what is the exhibit that's
8 being used with witness Brown?

9 MS. BIVENS: Where's the list that we gave
10 you of Brown? I don't -- I think we're -- or are you
11 talking about Brown?

12 THE COURT: Brown. That's what I asked, for
13 Brown. Are there any exhibits that are not already in
14 evidence being used with Brown?

15 MS. BIVENS: No.

16 THE COURT: Okay. And then the other
17 witness, if you will give me the name again, please.

18 MS. BIVENS: Her name is Christina
19 Cappellini.

20 THE COURT: Spell the last name.

21 MS. BIVENS: Okay. C-A-P-P-E-L-L-I-N-I.

22 THE COURT: And the exhibits that you wish
23 to use with her, if any.

24 MS. BIVENS: All right. For Christina
25 Cappellini it's 82-7.

1 THE COURT: 82-7. Let me just take a look.
2 I have my exhibit list here.

3 So it's Facebook postings on Crystal Head
4 Vodka's Facebook page?

5 MS. BIVENS: Yes, Your Honor. And that was
6 admitted during the last trial.

7 THE COURT: Okay. So no problem with that
8 one, I assume.

9 MS. BIVENS: No, Your Honor.

10 THE COURT: So I need to hear from the
11 defendant. No objection?

12 MR. HUMMEL: There's no objection to that
13 one, Your Honor.

14 THE COURT: So I may deem that admitted for
15 this trial, if I have not already done so, correct?

16 MR. HUMMEL: Yes.

17 THE COURT: Okay.

18 (EXHIBIT 82-7 ADMITTED.)

19 THE COURT: All right. The next exhibit to
20 be used with this witness?

21 MS. BIVENS: 593.

22 THE COURT: It's a reference to the Liquid
23 Living Magazine?

24 MS. BIVENS: Yes, Your Honor.

25 THE COURT: And objection to that one?

1 MR. HUMMEL: No, Your Honor.

2 THE COURT: And may I deem that one
3 admitted, unless it's already in?

4 So it's deemed admitted. If it's been
5 admitted already, it's fine. But if it hasn't then it
6 would be admitted as of today's date.

7 MS. BIVENS: Yes, Your Honor.

8 (EXHIBIT 593 ADMITTED.)

9 THE COURT: What's the next one?

10 MS. BIVENS: Exhibit 618, which has already
11 been admitted.

12 THE COURT: I'll deem that one admitted as
13 well.

14 (EXHIBIT 618 ADMITTED.)

15 THE COURT: What else do we have?

16 MS. BIVENS: Going to the 1100s,
17 Exhibit 1140.

18 THE COURT: 1140. And that one deemed
19 admitted or there's an objection to?

20 MR. HUMMEL: Which one is this?

21 THE COURT: 1140.

22 MR. HUMMEL: No objection.

23 THE COURT: Instagram posting.

24 MR. HUMMEL: No objection.

25 THE COURT: Okay. Deemed admitted.

1 (EXHIBIT 1140 ADMITTED.)

2 THE COURT: Okay.

3 MS. BIVENS: Exhibit 1141.

4 THE COURT: And that's a similar type of
5 exhibit. Is there an objection to that one?

6 MR. HUMMEL: There's no objection, Your
7 Honor.

8 THE COURT: Okay. That one is deemed
9 admitted.

10 (EXHIBIT 1141 ADMITTED.)

11 MS. BIVENS: Exhibit 1142.

12 THE COURT: And same type of exhibit.
13 Objection?

14 MR. HUMMEL: No objection, Your Honor.

15 THE COURT: Okay. Deemed admitted.

16 (EXHIBIT 1142 ADMITTED.)

17 MS. BIVENS: Exhibit 1244.

18 THE COURT: So it seems to be a similar type
19 of exhibit, an Instagram posting.

20 Any objection?

21 MR. HUMMEL: There is an objection to this
22 one, Your Honor.

23 THE COURT: Okay. So let me hear the
24 objection.

25 MR. HUMMEL: Right. So we would object to

1 this on the grounds of relevance. On the grounds of 403
2 that it's unduly prejudicial. There's also a lack of
3 foundation.

4 This Instagram post, or whatever it is, is a
5 picture of a Crystal Head Vodka bottle. So Globefill's
6 bottle that some artist painted to resemble a KAH
7 Tequila bottle.

8 It has no relevance. There's no issue of
9 confusion. Someone took a bottle and painted it, you
10 know, their bottle and painted it to look like our
11 bottle. It's obviously prejudicial to the extent
12 they're going to suggest that no -- well, I don't know
13 what they're going to suggest. But it's certainly
14 prejudicial to us that someone painted this bottle.
15 It's offered for an issue of confusion.

16 THE COURT: Okay. So lack of foundation.
17 If that was the only issue, then I would expect -- and
18 if this comes up with other exhibits too -- that counsel
19 would lay that foundation with the witness who's being
20 called. So you couldn't publish it until that
21 foundation is laid.

22 But the other issue, relevance and why it's
23 needed, since there are so many Instagram postings
24 already. So I'll let counsel make that argument.

25 MS. BIVENS: Yes, Your Honor. You alluded

1 to the first argument that we have is that there have
2 been several other postings already admitted into
3 evidence in 2013 during this trial. It is all relevant.
4 And Ms. Cappellini's testimony will explain further why
5 this is relevant.

6 The other issue is that this exhibit goes
7 straight to a point that plaintiff is making that people
8 relate the two bottles such that somebody would post on
9 their Instagram feed a picture of Crystal Head painted
10 like the KAH bottle.

11 THE COURT: Well -- and I think one question
12 is can this witness do all of that? And the Court would
13 have to determine the relevance. I can't determine that
14 through this witness. So I need to determine that first
15 so you'll know whether you can use it or not.

16 But this one, I think it would be helpful if
17 I had a proffer as to what she would be saying about
18 this posting.

19 Counsel is correct. We have a lot, but it
20 doesn't mean that all of the postings come in. And so
21 one question would be, do you even need this one? This
22 one may be different from the others and unique in some
23 way.

24 MS. BIVENS: It is.

25 THE COURT: But why don't you make the

1 proffer, and then maybe I can better understand why this
2 one is one that you think should be received.

3 MS. BIVENS: Yes, Your Honor.

4 So Christina Cappellini, as the Court will
5 learn tomorrow, is the director of marketing at
6 Globefill. And she's been working in some capacity
7 since 2009, and part of her job responsibilities is to
8 monitor social media and to supervise the person at
9 Globefill who's solely responsible for social media.

10 On October 17, 2016, less than months ago,
11 doing something she normally does, she forwarded to
12 Jonathan Hemi, who you heard testify just a while ago,
13 an Instagram post that she thought was brand confusion.
14 Because when she first saw this Instagram post, she
15 thought that it was a KAH bottle.

16 It's specifically KAH Anejo Anejo. I think
17 it's like Exhibit 56.

18 She thought it was a KAH Anejo Anejo bottle,
19 and forward it to Jonathan tagged as Crystal Head Vodka.

20 Just a few weeks ago, as she was preparing
21 for trial in this case, Ms. Cappellini looked more
22 closely at the bottle and realized that the user was in
23 fact showing off the fact that she had a -- or he. I'm
24 assuming TipseyBride had posted the Crystal Head bottle
25 painted as a KAH bottle.

1 THE COURT: So why would that be relevant
2 here? So it's not anyone associated with the case, I'm
3 assuming, that that did the posting. Is she attributing
4 it to someone involved in the case?

5 MS. BIVENS: Right. And so most of
6 Ms. Cappellini's testimony speaks to the fact that
7 social media has essentially become tainted with people
8 who affiliate the bottle, take pictures of bottles
9 together, because they think they're so similar and
10 related. And they're posting pictures that create
11 the -- an environment where people can become confused
12 about the bottle, and have made it more difficult for
13 Crystal Head to market its product.

14 Those are two key issues in this case.

15 THE COURT: And how do we know that someone
16 thought that they were similar and that's why it's
17 posted?

18 MS. BIVENS: We're not -- we're not offering
19 them for the truth of what was posted, but the idea that
20 these kind of images online -- which we'll explain more
21 with the demonstratives, hopefully, tomorrow -- have
22 clouded the Instagram feeds of hashtag Crystal Head
23 Vodka and other hashtags related to Crystal Head.

24 THE COURT: All right. Anything else on
25 this one?

1 MS. BIVENS: No, Your Honor.

2 THE COURT: Okay. Counsel wish to be heard
3 further?

4 MR. HUMMEL: Yeah, Your Honor, there's
5 nothing in this document to suggest that the person who
6 posted it was confused about anything. There's no
7 mention of KAH Tequila.

8 It happens to be painted in a way that is
9 similar to one of the KAH Tequila bottles. But it's
10 also similar to the way Calavaras painted in other
11 situations.

12 So there's no -- there's no relevance to
13 this. It doesn't show an instance of confusion in any
14 way. And it's prejudicial to the extent that someone
15 else may have infringed their trade dress, if they think
16 so or not. But it has nothing to do with an issue of
17 confusion between a bottle of KAH Tequila and a bottle
18 of Crystal Head. This is -- the poster itself is saying
19 that it's a hand-painted Crystal Head Vodka bottle.

20 So it's -- there's a tremendous chance of
21 confusion here amongst the jurors who somehow will think
22 the whole theme here is we copied their bottle. And
23 here is someone on the Internet who actually took the
24 bottle, hand painted it, not affiliated in any way with
25 KAH Tequila, and they're going to argue, obviously, that

1 this proves their point that it's the same bottle.

2 I think it's highly prejudicial and not
3 relevant.

4 THE COURT: Well, I won't try to anticipate
5 what they're going to argue.

6 But does counsel have anything further?
7 I'll let you have the final word on this. And the
8 Court's ready to rule.

9 MS. BIVENS: Yes, Your Honor. As far as
10 somebody being confused, the director of marketing at
11 Crystal Head Vodka was confused. So this actually is
12 evidence of actual confusion.

13 THE COURT: Okay. What will she say about
14 her confusion? She thought it was what?

15 MS. BIVENS: She thought it was the KAH
16 Anejo Anejo bottle.

17 THE COURT: And then at some time she
18 determined that it wasn't?

19 MS. BIVENS: Yes.

20 THE COURT: The objection will be sustained.
21 The Court finds that it's not relevant. Whether or not
22 it creates the kind of confusion that defense counsel is
23 suggesting, not -- not sure.

24 But based on the proffer, I would sustain
25 the objection.

1 Are there any other exhibits to be used with
2 this witness, from the plaintiff? Any other exhibits to
3 be used with this witness?

4 MS. BIVENS: Yes. 1246.

5 THE COURT: 1246.

6 Any objection to this one?

7 MR. HUMMEL: No objection.

8 THE COURT: Okay. And so the Court would
9 deem it admitted.

10 (EXHIBIT 1246 ADMITTED.)

11 THE COURT: Next.

12 MS. BIVENS: 1281.

13 THE COURT: 1281.

14 1281, any objection?

15 MR. HUMMEL: No objection.

16 THE COURT: It will be admitted.

17 (EXHIBIT 1281 ADMITTED.)

18 MS. BIVENS: 1246 -- I said that one
19 already. 1283.

20 THE COURT: 1283. Another posting.

21 Any objection?

22 MR. HUMMEL: No objection.

23 THE COURT: Deemed admitted.

24 (EXHIBIT 1283 ADMITTED.)

25 THE COURT: Any other exhibits to be used

1 with the witness?

2 MS. BIVENS: The defendants have offered
3 exhibits for cross-examination, and plaintiffs have no
4 objection, or have withdrawn all of their objections to
5 the defendants' exhibit.

6 THE COURT: All right.

7 MR. HUMMEL: Can we just clarify one point.
8 On 1281, I think it's just two pages from
9 that.

10 MS. BIVENS: My understanding from counsel
11 is that we -- 1281, the entire exhibit.

12 THE COURT: But I think counsel is asking
13 for guidance. Could we pull up that exhibit just so
14 we'll know how many pages.

15 MS. BIVENS: Your Honor, I think that they
16 are -- they have a disagreement about this.

17 MR. HUMMEL: No, no, no. The list here that
18 I have is 1281-1 and 1281-16.

19 THE COURT: Well, on the Court's list, joint
20 exhibit list, I just have 1281. Not broken down by
21 other numbers.

22 MS. BIVENS: Can we have a second to confer,
23 Your Honor.

24 THE COURT: Sure.

25 MS. BIVENS: Thank you.

1 THE COURT: Off the record.

2 (OFF THE RECORD.)

3 THE COURT: Back on the record now?

4 MS. BIVENS: Yes, Your Honor.

5 THE COURT: All right.

6 MS. BIVENS: The parties do not want to put
7 into the record the entire Exhibit 1281. We want to
8 break it out by page number.

9 THE COURT: So how many pages of the
10 exhibit? And maybe you should show that to defense
11 counsel, because the Court just deemed it admitted.

12 MS. BIVENS: They've already seen it and
13 they agreed to the two pages, 1281-1 and 1281-16.

14 THE COURT: All right. Does defense counsel
15 agree? Apparently there are only two pages that they
16 wish to offer, and they are the two that plaintiff's
17 counsel has indicated.

18 MR. HUMMEL: Yes.

19 THE COURT: Okay.

20 MR. HUMMEL: Going to come back to this
21 exhibit in a minute.

22 THE COURT: Okay. Do we need to return to
23 it for something?

24 MR. HUMMEL: Yeah, because there's more
25 pages that we've agreed between the two of us that we'll

1 offer. So --

2 THE COURT: Oh.

3 MR. HUMMEL: -- it's a big exhibit and broke
4 it up into little pieces. Sorry for the confusion, Your
5 Honor.

6 THE COURT: All right. Why don't we take a
7 moment then, if we think that we can do it now, and just
8 kind of straighten out which portions of this exhibit
9 the Court should deem admitted. Then both sides will
10 know what you can use.

11 Plaintiffs apparently had planned to use
12 only two pages, correct?

13 MS. BIVENS: Yes.

14 THE COURT: But I don't know how many pages
15 defendants are using, and so that would be the next
16 question that I would ask, that defendants identify the
17 exhibits that they plan to use in cross.

18 MR. HUMMEL: Sure.

19 THE COURT: So if it will help you, we can
20 go off the record to let you confer.

21 MR. HUMMEL: No. We've conferred.

22 THE COURT: Okay. So you're ready to
23 identify?

24 MR. HUMMEL: Yes, Your Honor.

25 THE COURT: All right. So for

1 cross-examination, if we can just have a list of the
2 exhibits that defendant plans to use. If there's no
3 objection, I will deem those admitted.

4 MR. HUMMEL: My understanding, Your Honor,
5 is that there is no objection to any of these.

6 THE COURT: Okay. Let's have the numbers
7 just so we don't have any surprises tomorrow.

8 MR. HUMMEL: Correct.

9 1143, Your Honor.

10 THE COURT: Yes.

11 MR. HUMMEL: 1144. 1145. 1146. 1147.

12 1148. 1151. 1152. 1155.

13 And then we go back to Exhibit 1281.

14 THE COURT: Which pages?

15 MR. HUMMEL: 2, 4, 6, 12, 17, 18 and 42.

16 THE COURT: All right. So now that we have
17 the numbers and the pages of 1281, any objection to
18 those being deemed admitted and defendant using them
19 with their cross-examination of this witness?

20 MS. BIVENS: No, Your Honor.

21 THE COURT: Okay. They are all deemed
22 admitted.

23 ^ (EXHIBITS 1144, 1145, 1146, 1147, 1148,
24 1151, 1152, 1155 and 1281 ARE ADMITTED.)

25 MR. HUMMEL: Thank you, Your Honor.

1 THE COURT: All right. So I just want to
2 make sure on our timing. So what is the time for the
3 direct examination of Christina Cappellini?

4 MS. BIVENS: Approximately an hour.

5 THE COURT: Well, if you remember, we only
6 have two hours tomorrow. And it sounds like we'll use
7 one hour with David Brown. So I just want to -- it's
8 close. But today I think counsel, both sides, probably
9 used a little less time than you estimated.

10 So you expect an hour. And -- but we
11 haven't left any time for cross, unless you were
12 including that in your hour's time estimate.

13 MS. BIVENS: I wasn't.

14 THE COURT: You were not. So how much time
15 defense expect that you will need for cross?

16 MR. HUMMEL: I don't know. I wasn't
17 expecting the hour. Forty-five minutes maybe, which is
18 going to be too much time.

19 THE COURT: Yes, we won't have enough time
20 to finish this witness. So yesterday when I raised the
21 question, I said if you have another witness that you
22 think you can complete in an hour, both direct and
23 cross, then we would have time for a second witness.

24 But this -- unless you are going to reduce
25 your time estimate -- and you are using a lot of

1 exhibits with the witness Cappellini, so you may need
2 the amount of time that you've estimated.

3 So what's thinking on that? Do you want to
4 bring her, knowing that there would be only -- if David
5 Brown takes an hour, or if you take an hour with David
6 Brown, then you will only have one more hour tomorrow.

7 MS. BIVENS: Your Honor, can I have a moment
8 to confer.

9 THE COURT: Sure.

10 MS. BIVENS: Your Honor --

11 THE COURT: Back on the record.

12 MS. BIVENS: So just as far as timing goes,
13 the plaintiff expects to -- for Davy Brown to last only
14 15 minutes. And Cappellini will last 45.

15 THE COURT: All right. So just so counsel
16 know, that's fine with the Court. But I know you don't
17 want to have her have to return on another day, and I do
18 need to leave at ten tomorrow.

19 MS. BIVENS: Yes, Your Honor.

20 THE COURT: Okay.

21 All right. We can go to Tuesday.

22 MR. HUMMEL: Your Honor, there is one other
23 issue with respect to Ms. Cappellini. There are some
24 demonstrative exhibits.

25 THE COURT: Okay. And you've exchanged

1 those, or at least both sides have seen them, and
2 there's an objection to all of them or some of them?

3 MR. HUMMEL: Well, yeah, I did see them
4 today. Although there is one slide which I guess hasn't
5 been prepared yet, which I'm not sure how I'll react to
6 it. But I have not seen --

7 THE COURT: I think it can't be used.
8 Counsel can prepare it and show it to you, and you have
9 no objections, that's fine. But if you have objections,
10 since we are settling all of that today, I would say if
11 there's any objection it just can't be used.

12 MR. HUMMEL: Well, I have objections to
13 this, to this demonstrative --

14 THE COURT: Okay. I just need to see the
15 demonstrative and hear what the objection is and --

16 MS. BIVENS: I can show you.

17 THE COURT: Okay. Then I can see it.
18 Looking at the screen now.

19 MS. BIVENS: Your Honor, before we start, I
20 want to make clear that we had to -- because of the
21 Court's ruling just now, we removed one slide, and we're
22 going to remove two more based on some testimony today.
23 So we're really only talking about one slide.

24 THE COURT: Okay. And would you identify
25 that one slide for counsel. And if he has no objection,

1 then --

2 MR. HUMMEL: This slide is the -- I do have
3 not an objection to this one, Your Honor.

4 THE COURT: Okay. Does it have a number
5 just for reference?

6 MS. BIVENS: Oh, I'm sorry.

7 THE COURT: What is the number?

8 MR. BERG: Your Honor, with your permission,
9 I am supposed to meet a back doctor. And I wonder if I
10 can be excused.

11 THE COURT: Sounds important to me. You may
12 be excused.

13 MR. BERG: Thanks.

14 MS. BIVENS: Exhibit 1142.

15 THE COURT: 1142.

16 And maybe counsel can just describe what it
17 is. I mean, I can see it. But to understand why you
18 think it's important to your case.

19 MS. BIVENS: This is a demonstrative that
20 will explain to the jury how social media posting works,
21 and liking on social media, to give context to the
22 exhibits.

23 THE COURT: So can't a witness do that
24 without this demonstrative?

25 MS. BIVENS: No.

1 THE COURT: I don't know. But all of you
2 probably know.

3 MS. BIVENS: Well, I've learned since being
4 on this case, no. I think that a juror will need this
5 kind of context to understand social media, because if
6 you don't use it you don't know.

7 THE COURT: All right. Could I hear the
8 objection to it.

9 MR. HUMMEL: Yeah, Your Honor. This
10 demonstrative here implies that this particular photo
11 went to all of these unnamed individuals here. It
12 doesn't bear any relation to reality. It has no
13 foundation.

14 If Ms. Cappellini would like to testify
15 generally about what happens on social media, I don't
16 have a problem with that. But to imply that this
17 picture went out to all these friends, to all this,
18 whatever this is supposed to be -- I'm not even sure
19 what it's supposed to be. I object to this without
20 knowing what it's --

21 THE COURT: Maybe plaintiff's counsel could
22 clear that up on your examination.

23 MS. BIVENS: Absolutely.

24 THE COURT: If it's just a demonstrative,
25 then I'm sure that you will make some inquiry of the

1 witness as to what it actually represents.

2 MS. BIVENS: Absolutely.

3 THE COURT: All right. Objection overruled.
4 I will allow it to be used. But I think --

5 MR. MILLER: Your Honor --

6 THE COURT: Oh, I'm so sorry.

7 MR. MILLER: That's all right. That's all
8 right. I have kind of a continuing problem with the
9 words Crystal Head in the lower right-hand corner on any
10 exhibit or demonstrative evidence that shows both
11 products, because I think that can be a subliminal
12 attempt to create confusion. There's just no reason to
13 have that heading like it's Court approved.

14 THE COURT: So that heading probably doesn't
15 have anything to do with this exhibit --

16 MS. KIM: Your Honor, we'll take it out.

17 THE COURT: Okay.

18 MS. KIM: It's just a standard footer, so
19 we'll take it out of everything.

20 THE COURT: That's what I assumed.

21 All right. And so defense counsel shall
22 just see it in the redacted form and be satisfied that
23 they have removed whatever it is that you found
24 objectionable.

25 So I won't do that and won't raise any

1 question about it. So if any exhibit gets redacted in
2 some way, modified in some way, then it's the
3 responsibility of counsel who wants to use it to show it
4 to the other side in its redacted form or modified form.
5 And then if you still have an issue with the exhibit,
6 then you need to bring it to the Court's attention.
7 Otherwise, it will -- we will not have any further
8 discussion on it. I'll assume that it's okay.

9 All right. So have we taken care of the
10 demonstrative to be used with the witness?

11 MS. BIVENS: Yes, Your Honor.

12 THE COURT: All right. So are we ready to
13 go to Tuesday?

14 MS. BIVENS: Yes, Your Honor.

15 THE COURT: So for Tuesday, first what I
16 need is the witnesses who will be called, the time
17 estimates and the exhibits to be used, and then if
18 there's any objection.

19 If there are no objections to the exhibits,
20 we'll deem them admitted now. And if there's any
21 discussion about witnesses, then I'm sure it will be
22 raised.

23 So Tuesday I would expect that we would work
24 about five hours, as we did today. Hopefully, we'll
25 start on time, eight o'clock, and we would recess the

1 jury. I tell the jury no later than two, just to give
2 us 30 minutes just in case we need it. But I don't have
3 any plans for next Tuesday so I could stand longer if we
4 needed to.

5 So while counsel's getting ready for this
6 discussion, just a couple things I want to bring to your
7 attention.

8 So today there was a motion in limine. And
9 you probably all remember which one it was. And it was
10 actually plaintiff's motion in limine, but it was also
11 plaintiff counsel that raised the subject, in the
12 Court's opinion. So I think all counsel on both sides
13 need to review the motions in limine, the orders that
14 have been issued, so that you are not raising a subject
15 that the Court has either excluded or you don't forget
16 to raise one that the Court permitted you to raise.

17 But the one that I'm talking about is motion
18 in limine No. 2. And it was plaintiff's motion,
19 in limine No. 2, to exclude evidence of plaintiff's
20 Mexican seizure response.

21 So the witness on the stand talked about the
22 seizure, which would be in violation of the order
23 because I granted the motion. So it may be that what
24 you need to do is alert your witnesses as well. So if
25 there's a subject matter that has been excluded or if

1 you're unclear about it, witnesses need to know this is
2 not a topic that you're permitted to raise.

3 So that's one of the reasons that a few
4 times today I said counsel needs to be more careful with
5 the questions. Because when you have a witness like
6 this, all of this is knowledgeable to him. I mean, he's
7 lived it, so he's prepared to tell the story not knowing
8 that maybe certain things have been excluded. So just
9 wanted to raise that with you. Pay attention to the
10 motions and the ruling on the motions and advise
11 witnesses to the extent they need to be advised.

12 Another topic that I want to raise -- and
13 this may come as a surprise to you. So in the new
14 building, in chambers the Court can hear what is being
15 said in the courtroom, even when the Court is away, not
16 on the bench. So if you are discussing things in the
17 courtroom, you need to turn away from the mikes or move
18 away from the mikes.

19 So today, I raised the question with my
20 staff, you know, I'm hearing a lot. Why am I hearing
21 it? So the answer is that the chambers are set up so
22 that anyone in chambers can actually listen to the
23 proceedings in the courtroom. And that's fine. But
24 then when we are not in session but counsel are still in
25 the courtroom discussing things, we can also hear your

1 discussion. So it may be that you don't wish to have
2 the Court or the Court staff hear this discussion. So
3 just -- I raise that with you just so that you are
4 aware.

5 Another question that I was going to raise,
6 the jury instructions that were used at the first trial,
7 do you intend that those instructions will be used at
8 this trial? And maybe you've already gone over them.
9 You have added some. You may have taken some away. So
10 you may have already considered this. And I don't need
11 to raise it with you, but I wanted to raise it now
12 because we will get to jury instructions probably be
13 discussion that the Court will have with counsel will be
14 sometime next week.

15 So if it's a subject that you're already
16 paying attention to and have some thoughts on it, you
17 don't need to say anything more to me about it, but I
18 just wanted to raise it with you.

19 Counsel.

20 MS. KIM: Your Honor, you know, we did file
21 joint court instructions. We also filed separate for
22 the ones we didn't agree upon. However, you know, I've
23 kind of gone through both sets, and I do think that
24 there is a lot of room for us to work with defendant.
25 And I think that there -- what we should do is probably

1 work with defendant, meet and confer, get as much
2 agreement as we can. We'll file something again that's
3 joint with the exhibits. We'll have an Exhibit A and B
4 for the ones that are still remaining, where we still
5 have a dispute, and then we can raise it with the Court
6 on Tuesday.

7 THE COURT: All right. So that would be
8 beneficial. Because what I will do look, I will look at
9 what you've given me, and then I will prepare what I
10 call a court's set. And that is the set that we will
11 use for settlement purposes just to have our
12 discussions. And so I may use most of yours, but I may
13 put in some additional ones or I may feel that some are
14 not appropriate. So that would be something that you
15 would need to know.

16 So if you're prepared to provide whatever
17 you have filed, based upon your best efforts to agree,
18 to the extent that you can -- I realize you can't always
19 agree, and I appreciate your trying to agree on these
20 things -- then if I have that by Tuesday, then I will
21 review them and be able to give you some indication as
22 to which of those the Court might use pretty early next
23 week.

24 The same with the verdict form. And I
25 imagine that your comments would be the same. You've

1 looked at the one from the first trial and you've put
2 something together that you think may be acceptable to
3 both sides.

4 MS. KIM: Yes, Your Honor. I think we can
5 work that out.

6 THE COURT: Okay. Very good. So I'm ready
7 now to have you identify the witnesses for Tuesday and
8 the exhibits to be used.

9 MS. KIM: Your Honor, Jenny Kim for the
10 plaintiff. So on Tuesday we intend to call Raul Marmol.

11 THE COURT: If you will just spell the last
12 name for the record, please.

13 MS. KIM: M-A-R-M-O-L.

14 THE COURT: And your time estimate for your
15 direct examination.

16 MS. KIM: Forty-five minutes.

17 THE COURT: And the cross.

18 MR. HUMMEL: I think we'll reserve a similar
19 time, Your Honor.

20 THE COURT: Okay. Next.

21 MS. KIM: And we don't anticipate using any
22 exhibits for Mr. Marmol.

23 THE COURT: Thank you.

24 Any exhibits to be used by defense?

25 MR. HUMMEL: Two, to which I understand

1 | there is no objection.

2 | THE COURT: And would you identify them.

3 MR. HUMMEL: Absolutely, Your Honor.

4 764 and 765.

5 THE COURT: 764 and 765.

6 | No objection by plaintiffs?

7 MS. KIM: No objection.

8 THE COURT: I will deem those admitted.

9 (EXHIBITS 764 and 765 ADMITTED.)

10 THE COURT: And the next witness.

11 MS. KIM: The next witness will be

12 | Kim Brandi, Your Honor.

13 THE COURT: And your time estimate.

14 MS. KIM: Two hours, Your Honor.

15 THE COURT: And defendants will be

16 | conducting not only your cross-exam, if you have

17 cross-exam, but also direct exam.

18 Is that correct?

19 MR. MILLER: Correct, Your Honor.

20 | If it's all right with the Court, I'd like

21 to be the one who questions Ms. Brandi after they

22 | complete their direct.

23 THE COURT: Since you're representing her,

24 | that seems right to me.

25 MR. MILLER: And I'm expecting a pretty

1 solid two hours too on what will be in response, plus
2 what she would say independently, in accordance with
3 Your Honor's wishes.

4 THE COURT: That's fine.

5 MR. MILLER: That's independent of what
6 Elements may have.

7 THE COURT: So will Elements also be
8 conducting some examination of Ms. Brandi?

9 MR. HUMMEL: Yes, I believe we will.
10 Obviously, it depends on what the course of the direct
11 or the cross or direct is going to be. But we won't
12 cover the same ground. Obviously.

13 I would say -- I would like to reserve
14 45 minutes just in case. But it might be shorter.

15 THE COURT: All right. So if your time
16 estimates are correct -- hopefully they are not.
17 Hopefully you are overestimating -- two hours for the
18 plaintiffs. Two hours for -- and 2 hours and 45 minutes
19 for the defendants. So that is almost a full day, so
20 just something that you could keep in mind. It's likely
21 that Ms. Brandi is going to be here anyway.

22 MR. MILLER: She will be.

23 THE COURT: So if we don't finish with her
24 on Tuesday, then we would just finish her examination on
25 Wednesday, and that's fine.

1 MR. MILLER: She'll be here -- aren't we
2 dark Wednesday, I think?

3 THE COURT: Wednesday, that's right.
4 Thursday would be the next day. You're right.

5 MR. MILLER: She'll be available on those
6 days, Your Honor.

7 THE COURT: Okay. Exhibits to be used with
8 Ms. Brandi for the plaintiffs.

9 MS. KIM: Yes, one second, Your Honor.

10 We have, starting with Exhibit 616, 616-2,
11 and 6166-62. It's my understanding that defendants have
12 no objection.

13 MR. MILLER: Correct.

14 THE CLERK: Could you repeat those exhibit
15 numbers.

16 MS. KIM: Yes. Exhibit 616, 616-2 and
17 616-62.

18 THE COURT: No objection. Those are deemed
19 admitted.

20 MS. KIM: Thank you, Your Honor.

21 (EXHIBITS 616, 616-2 and 616-62 ADMITTED.)

22 THE COURT: And then for the other
23 examination, whether it's cross or direct, do the
24 defendants expect to be using exhibits?

25 MS. KIM: I think we have several more, Your

1 Honor.

2 THE COURT: Oh, you have more. All right.
3 I thought that was too easy.

4 Okay. Continue.

5 MS. KIM: 615.

6 MR. MILLER: No objection on that.

7 THE COURT: Deemed admitted.

8 (EXHIBIT 615 ADMITTED)

9 MS. KIM: 620.

10 MR. MILLER: No objection on that.

11 THE COURT: Deemed admitted.

12 (EXHIBIT 620 ADMITTED)

13 MS. KIM: 617.

14 MR. MILLER: No objection on that.

15 THE COURT: Deemed admitted.

16 (EXHIBIT 617 ADMITTED)

17 MS. KIM: 574.

18 MR. MILLER: No objection on that.

19 THE COURT: Deemed admitted.

20 (EXHIBIT 574 ADMITTED)

21 MS. KIM: 574-A.

22 MR. MILLER: No objection on that.

23 THE COURT: Deemed admitted.

24 (EXHIBIT 574-A ADMITTED).

25 MS. KIM: 575.

1 MR. MILLER: No objection on that.

2 THE COURT: Deemed admitted.

3 (EXHIBIT 575 ADMITTED).

4 MS. KIM: 1275.

5 MR. MILLER: Oops. Yeah, objection on that
6 one, Your Honor.

7 THE COURT: Okay. I'll hear the objection
8 later. Counsel may continue.

9 MS. KIM: 618.

10 MR. MILLER: No objection.

11 THE COURT: Deemed admitted.

12 (EXHIBIT 618 ADMITTED)

13 MS. KIM: 618-4-5.

14 MR. MILLER: No objection to that, Your
15 Honor.

16 THE COURT: All right.

17 (EXHIBIT 618-4-5 ADMITTED)

18 MS. KIM: 618-28-30.

19 MR. MILLER: No objection.

20 THE COURT: Deemed admitted.

21 (EXHIBIT 618-28-30 ADMITTED)

22 MS. KIM: 578.

23 MR. MILLER: Objection to that one.

24 MS. KIM: 579.

25 MR. MILLER: No objection to that.

1 THE COURT: Deemed admitted.
2 (EXHIBIT 579 ADMITTED)
3 MS. KIM: 773.
4 MR. MILLER: Objection to that one.
5 MS. KIM: 352.
6 MR. MILLER: No objection to that.
7 THE COURT: Deemed admitted.
8 (EXHIBIT 352 ADMITTED)
9 MS. KIM: 463.
10 MR. MILLER: No objection.
11 THE COURT: Deemed admitted.
12 (EXHIBIT 463 ADMITTED)
13 MS. KIM: 553.
14 MR. MILLER: No objection to that one.
15 THE COURT: Deemed admitted.
16 (EXHIBIT 553 ADMITTED).
17 MS. KIM: 562.
18 MR. MILLER: No objection.
19 THE COURT: Deemed admitted.
20 (EXHIBIT 562 ADMITTED)
21 MS. KIM: 520.
22 MR. MILLER: No objection.
23 THE COURT: Deemed admitted.
24 (EXHIBIT 520 ADMITTED)
25 MS. KIM: 544.

1 MR. MILLER: No objection.

2 THE COURT: Deemed admitted.

3 (EXHIBIT 544 ADMITTED)

4 MS. KIM: 593.

5 MR. MILLER: No objection.

6 THE COURT: Deemed admitted.

7 (EXHIBIT 593 ADMITTED)

8 MS. KIM: That's it for plaintiffs, Your
9 Honor.

10 THE COURT: All right. I'll hear then those
11 objections to those that have been identified to which
12 defense have objections. I would be prepared to listen
13 to that now.

14 So the first one is 1275?

15 MR. MILLER: Correct, Your Honor.

16 THE COURT: Okay.

17 MR. MILLER: Your Honor, this is a cease and
18 desist letter that was sent actually to me by counsel
19 for Elements that related -- or that actually resulted
20 in the Elements versus Brandi lawsuit which Your Honor
21 has ruled, for the most part, as being excluded by
22 in limine motion.

23 THE COURT: Which in limine motion? The
24 number?

25 MR. MILLER: The number on it. It's -- it's

1 a defense in limine motion to exclude evidence and
2 testimony regarding the lawsuit between the defendants
3 in this action.

4 THE COURT: Somebody on my staff may be able
5 to find it, if it's necessary for me to review it.

6 You may continue.

7 MR. MILLER: Your Honor has -- the ruling
8 might just be as easy. I can read to Your Honor.

9 THE COURT: And you don't have to.

10 MR. MILLER: Oh, okay.

11 THE COURT: You believe that the ruling on
12 the motion in limine would preclude the use of this
13 exhibit?

14 MR. MILLER: There's also no relevance to
15 this litigation. But it's -- this is specifically
16 the -- the -- the threat which culminated in the lawsuit
17 against Ms. Brandi filed by Elements, which was the
18 subject matter of that motion.

19 THE COURT: And is this the lawsuit that is
20 before I think it's Judge Pregerson?

21 MR. MILLER: It is.

22 THE COURT: Okay. It's not this lawsuit?

23 MR. MILLER: Correct. And it was
24 specifically -- the cease and desist letter was actually
25 specifically mentioned in the motion in limine as one of

1 the prejudicial exhibits that were entailed by the
2 motion.

3 THE COURT: Okay. What do the plaintiffs
4 say about that? Do you believe it was the subject of a
5 motion in limine? If so, are you able to identify which
6 motion? And do you think it covered the -- this cease
7 and desist letter?

8 MS. KIM: We're getting the docket number
9 information for Your Honor. But in the interim, Your
10 Honor's order on that motion actually said that we could
11 use information from this lawsuit when it contained
12 admissions from the defendants or their agents, and that
13 we could also use this evidence from this lawsuit and/or
14 relating to this lawsuit for impeachment purposes.

15 THE COURT: So I will reserve ruling on this
16 one because I'll need to actually see the order. And I
17 may even need to see the motion just to determine the
18 scope of it.

19 So as to 1275, the Court is reserving
20 ruling. If the Court reserves ruling on an exhibit, that
21 means it cannot be used until the Court has so
22 instructed. So counsel should not use an exhibit that
23 the Court hasn't actually ruled upon.

24 MS. KIM: So the docket number the motion
25 in limine was 468. And Your Honor's order was docket

1 No. 517.

2 THE COURT: Okay. I'll take a look at that
3 later. So let's go to the next one, 618-4-5.

4 MS. KIM: I don't think there was an
5 objection to that, Your Honor.

6 THE COURT: No objection?

7 MR. MILLER: No, Your Honor.

8 THE COURT: Oh, okay. That's deemed
9 admitted.

10 THE CLERK: What was that exhibit number?

11 THE COURT: It's 618-4-5. That's deemed
12 admitted.

13 The next one I think that's being objected
14 to is 578?

15 MR. MILLER: Correct, Your Honor.

16 THE COURT: So counsel may state the
17 objection.

18 MR. MILLER: Your Honor, this is a 38, I
19 think it is, page confidential private offering
20 memorandum. That was not prepared by Ms. Brandi, and I
21 think it's irrelevant.

22 THE COURT: Okay. Does plaintiff's counsel
23 wish to be heard?

24 MS. BIVENS: Yes, Your Honor. If you look
25 at the offering memo, for example, at page 3031.

1 THE COURT: So you're going to put it on the
2 screen for me so I can look at it?

3 MS. BIVENS: Of course, yes, Your Honor.

4 If you look at the bottom, this document
5 contains things like this where it says each bottle's in
6 the shape of a skull about the packaging, admissions
7 about the packing of the product, the marketing appeal.

8 THE COURT: And could you tell me it is a
9 private offering by Elements?

10 MS. BIVENS: Yes, it's a representation to
11 potential investors.

12 THE COURT: And so again, what is the
13 purpose for it, the exhibit, using it with Ms. Brandi?

14 MS. BIVENS: Representations that she made
15 about the bottle, the packaging, and how the packaging
16 will be marketed.

17 THE COURT: And what -- where is there in
18 the exhibit that would indicate that she made these
19 representations?

20 MS. BIVENS: There are email exchanges that
21 we have also indicating that she was a part of creating
22 this document.

23 THE COURT: I'm probably going to need to
24 see those. What is the question that you would be
25 asking her about this exhibit? So make a proffer.

1 MS. BIVENS: I mean, at this time -- first
2 of all, these are party admissions. And we would be
3 asking her about how this statement came to be, how
4 this -- these representations came to be, why they were
5 put there.

6 THE COURT: All right. Defense wish to
7 comment any further?

8 MR. MILLER: Well, all we've heard is in the
9 offer of proof is a statement not necessarily
10 attributable to Ms. Brandi and that the -- about the
11 shape of the bottle. But there's -- the best I have
12 seen, maybe five or six or so iterations of the shape of
13 the lines, three-dimensional bottle shapes already in
14 evidence in the courtroom. I don't -- it has -- it
15 doesn't have any significant probative value. But
16 instead we've got -- we've got a 38-page document
17 talking about finances and financial needs and all
18 these -- a whole bunch of stuff that we haven't heard
19 anything about. And we're going to have a jury leaping
20 through that because they want to establish what the
21 shape of the -- it's going to be in evidence? That
22 doesn't make -- I don't think there's enough probative
23 value there at all to overcome the -- the -- the time
24 waste and prejudice that's going to be involved in this
25 entire exhibit being entered into evidence.

1 MS. BIVENS: Your Honor --

2 THE COURT: So could counsel indicate how
3 many pages and which pages you are seeking to use.

4 MS. BIVENS: At this time, we can go through
5 the document. I cannot at this time identify exactly
6 what parts we can use -- we would like to use. But if
7 the Court would like us to work with counsel to redact
8 the parts that they find objectionable, we are willing
9 to do that.

10 THE COURT: Well, my concern is this is
11 Tuesday, and we won't have time. I mean, we'll be
12 discussing -- counsel would be attempting to use this
13 exhibit on Tuesday. There won't be any time to discuss.
14 So I'm fine with counsel meeting and hoping to agree,
15 but then if you don't agree, you would be wanting to use
16 this exhibit, and I still have an objection to the
17 exhibit.

18 What I'm inclined to do now is to rule on
19 the use of this exhibit just based upon the arguments
20 that have been made. I will still permit counsel to
21 confer. Once you are able to identify the part of the
22 exhibit that you want, if counsel agrees to that, you
23 could use it, because you have an agreement there too.

24 So for 578, I'm going to sustain the
25 objection. I don't see the relevance either.

1 Plaintiff's counsel says they're admissions by a party,
2 but I would need to have you identify those admissions.

3 It's not clear to me that what Ms. Brandi's
4 association is with this exhibit. So I sustain the
5 objection at this point. I will permit counsel to raise
6 it again. Instruct you to meet and confer and see if
7 you can agree as to which pages if any of this exhibit
8 can be used. And if you come to some agreement, then
9 you will advise the Court.

10 Let's go to the next exhibit. It's 773.

11 MR. MILLER: Correct, Your Honor.

12 773 it is -- you have it in front of Your
13 Honor, is a -- some kind of an invoice from a Chinese
14 bottler. That invoice it's dated after Ms. Brandi
15 wasn't responsible for the financial aspect of Elements.
16 The objection is that it is hearsay. It's going not be
17 properly authenticated since she did not generate of pay
18 the bill. But it's -- I'm not sure what the relevance
19 is of it, how much they paid for bottles and when. And
20 -- and 403, more prejudicial than probative.

21 THE COURT: Maybe counsel can advise what is
22 this exhibit?

23 MR. MILLER: You're asking me, Your Honor?

24 THE COURT: No. Plaintiff's counsel, since
25 plaintiff wants to use it. What is 77 -- 773? Maybe

1 you could also address the relevance, how you would
2 authenticate it, if it's not a document that can be
3 authenticated through the witness, and those issues.

4 MS. BIVENS: Your Honor, we're happy to also
5 provide the payment and the emails relating to this
6 document. But a lot of the issues in this case relate
7 to timing, and this dates when Ms. Brandi was ordering
8 bottles.

9 She at the time when the offering memo was
10 created, at the time this invoice was created, was the
11 CEO of the company, the founder of the company. And if
12 to be complete we need to also add as an exhibit the
13 documents surrounding this, we're happy to do that.

14 THE COURT: Right. I think you're going to
15 have to do that first before it can be used. And the
16 Court would need to know how do you associate this
17 document with her.

18 So the first question I ask is what is the
19 document? So the name that appears on the document,
20 it's an invoice. There is a date on the document as
21 well. Whose invoice is it?

22 MS. BIVENS: Okay. As of June 2010,
23 Ms. Brandi, like I said, was the CEO of Elements. But
24 also Fenos, a company owned by Federico Cabo, or
25 affiliated with Federico Cabo, was helping her pay the

1 bills, it appears. And so we will be questioning
2 Ms. Brandi about this interaction, the timing of
3 ordering the bottles, which is key to the timing of her
4 coming to market.

5 THE COURT: Well, and certainly it may be
6 appropriate to ask her those questions about ordering
7 the bottles, if you think she had something to do with
8 ordering the bottles. And depending upon her answer,
9 you may or may not use this exhibit.

10 But the Court, at this point, would sustain
11 the objection to the use of 773. Counsel may meet and
12 confer. You may provide the other parts to this. That
13 may satisfy defense counsel. But you're going to have
14 to show that since you are offering it through
15 Ms. Brandi, it's either her document, not her document.
16 But there needs to be some relationship.

17 So I sustained the objection to 773.

18 The next exhibit is Exhibit 520.
19 Exhibit 520, defense counsel has an objection to that.

20 MR. MILLER: Correct, Your Honor.

21 520 is, I don't think there's any -- there
22 will be any foundation for this. This is a document not
23 prepared by Ms. Brandi. As I understand it, I think may
24 have been prepared long after the actual date that it
25 has on it. And I'm -- it's unfortunate that I didn't

1 know she was going to be a witness Tuesday until we
2 finished today and she -- and I allowed Ms. Brandi to
3 leave. I would ask her, but I'm almost certain that
4 this is a document that was not prepared by Ms. Brandi.
5 In fact, that she disputes the -- the authenticity and
6 accuracy of this document.

7 THE COURT: Plaintiff's counsel can be heard
8 now or the Court will reserve ruling on it, and we can
9 discuss it at another time. But you would not be able
10 to use it with Ms. Brandi until the Court has had an
11 opportunity to rule on it. But you may want to put
12 something on the record now as to what it is, what you
13 think it represents, and why is Ms. Brandi the witness
14 with whom you would seek to admit this document.

15 MS. KIM: Your Honor, this is a transaction
16 detail for the KAH Tequila account, as my colleague
17 previously represented to the Court. Ms. Brandi was the
18 CEO of KAH Tequila of Elements at the time, and we
19 believe that this document shows a very distinct
20 timeline of all the events that happened with respect to
21 the development of the KAH bottle, which is one of the
22 primary issues in this case.

23 Ms. Brandi has previously testified in her
24 depositions and at the prior trial about certain dates.
25 We believe that this document refutes those dates. And

1 Mr. Miller has actually said that the timing of KAH
2 Tequila vis-à-vis the timing of the development of
3 Crystal Head was a coincidence, despite the overlap.
4 And we believe that this is one those documents that
5 would refute that theory of defendant's case.

6 THE COURT: So you will attempt to lay the
7 foundation for this document through Ms. Brandi?

8 MS. KIM: Yes, we absolutely will.

9 THE COURT: And so if you're not successful
10 in doing that, then of course you won't be able to use
11 the -- the document won't be admitted through --

12 MS. KIM: Of course, Your Honor.

13 THE COURT: You may need somebody else.

14 MS. KIM: Of course, Your Honor.

15 THE COURT: So the foundation will have to
16 be laid first. And if counsel is able to do that, you
17 can't publish the document. But the document could be
18 placed in front of Ms. Brandi, and if the foundation is
19 laid, then the Court would allow the exhibit to be used.

20 So not received yet. Reserve ruling until
21 the foundation is laid.

22 Let's see, the next one --

23 MR. MILLER: I believe that's it.

24 THE COURT: I think that's it.

25 All right. Anything else that you think

1 needs to be discussed? Because it may come up on
2 Tuesday. Yes?

3 MS. KIM: The defendants actually have
4 exhibits that they've identified for us that they plan
5 to use during Ms. Brandi's testimony.

6 THE COURT: All right. Why don't I have
7 those exhibit numbers and then see if there's any
8 objection. And if not, I'll deem them admitted.

9 MR. MILLER: All right.

10 THE COURT: So would counsel identify the
11 exhibits that you would use for Ms. Brandi.

12 MR. MILLER: Yes, Your Honor.

13 Exhibit 45.

14 THE COURT: 45.

15 Any objection?

16 MS. KIM: No objection.

17 THE COURT: Deemed admitted.

18 (EXHIBIT 45 ADMITTED)

19 MR. MILLER: Exhibit 55.

20 MS. KIM: Your Honor, all of these exhibits
21 are the bottles, the physical bottles. They've --
22 they're already in evidence, and we have no objection to
23 the physical bottles of the KAH Tequila or Crystal Head.
24 So we can just move on, I think.

25 THE COURT: Yes. And so those were deemed

1 admitted either last night or -- and they were actually
2 used today. Or today they were deemed admitted, so we
3 don't need to address those again.

4 MR. MILLER: I think that's 55 through 58.

5 MS. KIM: Yes.

6 MR. MILLER: 164.

7 MS. KIM: No objection.

8 THE COURT: Okay. Deemed admitted.

9 (EXHIBIT 164 ADMITTED)

10 MR. MILLER: 167.

11 MS. KIM: No objection.

12 THE COURT: Deemed admitted.

13 (Exhibit 167 ADMITTED)

14 MR. MILLER: 168.

15 MS. KIM: No objection.

16 MR. MILLER: 169.

17 MS. KIM: No objection.

18 THE COURT: Those are both deemed admitted,
19 168 and 169.

20 (EXHIBITS 168 AND 169 ADMITTED)

21 MR. MILLER: 493.

22 MS. KIM: Objection.

23 MR. MILLER: I tried to go in order.
24 473.

25 MS. KIM: No objection.

1 THE COURT: All right. 473 will be deemed
2 admitted.

3 (EXHIBIT 473 ADMITTED)

4 MR. MILLER: 474.

5 MS. KIM: No objection.

6 THE COURT: Deemed admitted.

7 (EXHIBIT 474 ADMITTED)

8 MR. MILLER: 475.

9 MS. KIM: No objection.

10 THE COURT: Deemed admitted.

11 (EXHIBIT 475 ADMITTED)

12 MR. MILLER: 499.

13 MS. KIM: Objection.

14 MR. MILLER: 719.

15 MS. KIM: No objection.

16 THE COURT: Deemed admitted.

17 (EXHIBIT 719 ADMITTED)

18 MR. MILLER: 620.

19 MS. KIM: No objection.

20 THE COURT: Deemed admitted.

21 (EXHIBIT 620 ADMITTED).

22 MR. MILLER: 618.

23 MS. KIM: No objection.

24 THE COURT: Give me that number again.

25 MR. MILLER: 618.

1 MS. KIM: That's already been deemed
2 admitted, Your Honor. It's the magazine.

3 THE COURT: If it's in evidence then we
4 don't need to discuss it.

5 MR. MILLER: 574-A.

6 MS. KIM: No objection.

7 THE COURT: Deemed admitted.

8 (EXHIBIT 574-A ADMITTED)

9 MR. MILLER: 1008.

10 MS. KIM: Objection.

11 MR. MILLER: 1009.

12 MS. KIM: Objection.

13 MR. MILLER: 1129.

14 MS. KIM: No objection.

15 THE COURT: Deemed admitted.

16 (EXHIBIT 1129 ADMITTED)

17 MR. MILLER: 1115.

18 MS. KIM: No objection.

19 THE COURT: Deemed admitted.

20 (EXHIBIT 1115 ADMITTED)

21 MR. MILLER: 1130.

22 MS. KIM: No objection.

23 THE COURT: Deemed admitted.

24 (EXHIBIT 1130 ADMITTED)

25 THE COURT: Any other exhibits to be offered

1 by defense?

2 MR. MILLER: I think that's it for all
3 defendants.

4 THE COURT: For all defendants, all defense
5 counsel.

6 Then let's go back and look at the ones to
7 which there's an objection. 493 is the first one.

8 MS. KIM: Your Honor, we can actually handle
9 our objection to to all four of these documents at once.

10 493 and 1008 are the trademark application
11 for the word marks KAH and Day of the Dead that were
12 filed by defendants.

13 499 and 1009 are the trademark certificates
14 that were issued for those same word marks.

15 THE COURT: All right. Do you think that
16 there was a motion in limine as to this and the Court
17 has ruled on it. Or --

18 MS. KIM: There hasn't been a motion
19 in limine with respect to these specific word marks.
20 However, Your Honor specifically ruled, I believe it was
21 yesterday in court, that plaintiff's trademarks for the
22 word marks Crystal Head were not relevant to this
23 action. And that was based on defendant's objection.

24 Defendants have actually stated today that
25 they don't think work marks are relevant to this action

1 because this is an action about bottles and the shape of
2 bottles.

3 Accordingly, we don't know why these word
4 mark trademark registrations and/or applications are
5 relevant to this action. However, we are willing to
6 withdraw this objection if defendants are willing to
7 withdraw their objection to our word mark trademark
8 registration, and we can work it that way.

9 THE COURT: All right. Anything further
10 from the defendants before the Court rules?

11 MR. MILLER: Yes, Your Honor. We're not
12 willing to make that trade. These are premarked
13 exhibits timely and included in the pretrial order
14 for -- as one major contrast between what's being
15 offered by counsel and what we're asking to introduce.

16 These go to the timeline, Your Honor, in
17 Ms. Brandi Ms. Brandi's -- Ms. Brandi set this company
18 up and -- and did most of this on her own. It creates
19 the very timeline that counsel wants to -- to help that
20 we all want to establish with the jury. And it shows
21 when things happened, Ms. Brandi taking control. It
22 shows her progression in the creation of a brand that
23 counsel's acting like wasn't created until the end the
24 2010.

25 THE COURT: Well, certainly she'll be able

1 to testify to that.

2 MR. MILLER: She can authenticate all of
3 these. They were her actions.

4 THE COURT: All right. Anything further
5 from the plaintiffs?

6 MS. KIM: Yes, Your Honor.

7 As Your Honor just pointed out, you know,
8 Ms. Brandi can testify to that. You know, there's no
9 reason for these trademarks to come in. We think that,
10 honestly, the same argument regarding the relevance of
11 these word mark trademarks, which is that it would
12 establish a timeline for Ms. Brandi, would be an
13 applicable argument for why our word mark trademark
14 should come in, which honestly our first word mark
15 trademark was in 2006.

16 I don't really understand defense counsel's
17 point regarding how she just started this company by
18 herself and why that's applicable here.

19 However, like I said, you know, Your Honor
20 ruled that word mark trademarks are not applicable to
21 this action that concerns the shape of bottles.

22 THE COURT: All right. The objection is
23 sustained to 493, 499, 1008 and 1009.

24 All right. Any other discussions that we
25 need to have in order to be ready for Tuesday?

1 MS. KIM: I think everyone's going to hate
2 me for raising this, because I think people want to go
3 home. But I do think there is --

4 THE COURT: Well, it's only 4:40 -- oh, no.
5 It's 5:47. Oh, getting close to 6 o'clock. All right.

6 MS. KIM: But I do believe there is a
7 pending motion in limine on a motion to compel the
8 settlement documents from the iconic litigation. And I
9 didn't know if Your Honor had an order prepared or if
10 you wanted to discussion that.

11 THE COURT: When would this come up, with
12 what witness? Is it going to likely come up on Tuesday?

13 MS. KIM: It might come up with Ms. Brandi,
14 Your Honor.

15 THE COURT: Okay. All right. So I do have
16 some notes on this one. So I think it's premature.

17 The defendants have represented that the
18 settlement agreement has not been finalized. And so if
19 it's not a final settlement agreement, it's premature.

20 Also, if it -- it's case over which Judge
21 Pregerson is presiding. So I think a motion would have
22 to be made before Judge Pregerson first asking that the
23 settlement agreement be disclosed, if it's not already a
24 public document. If he permits it to be disclosed, then
25 we have the question of whether this Court would find it

1 to be relevant.

2 So that's my position at this point that
3 it's premature. But maybe there's something that I
4 don't know. So let me hear.

5 MR. VERA: Thank you, Your Honor. Briefly.
6 It's my understanding that in that action there was a
7 protective order, and the parties went to the length of
8 having Globefill be a party to that.

9 What we would suggest, if Your Honor is
10 uneasy with production, for there to be an in camera
11 inspection of that, because we feel like we are simply
12 unable to properly impeach a party about her
13 credibility, given that we don't have the contents to
14 that.

15 And they've admitted in their opposition,
16 Your Honor, that the document exists, but one of either
17 five or six parties hasn't signed. So if the relevant
18 parties have signed, if Ms. Brandi and Elements have
19 signed, then as to those parties there's an operative
20 agreement that provides for particular provisions. We
21 don't know what those are. We don't see any problem
22 with an in camera inspection of those. And maybe that
23 would give some more guidance to Your Honor at that
24 time.

25 THE COURT: Well, I'm surprised that you

1 even want to use something that you haven't seen. But I
2 think you have to go to Judge Pregerson first.

3 So if it is a document that's either under
4 seal or confidential in some way, in other words, it's
5 not public yet, not finalized yet, then I think the
6 first motion would be before Judge Pregerson. If he
7 allows the parties to have the document so that you can
8 review it and decide if it's relevant here, then this
9 Court could rule on the relevance and I would be happy
10 to review it in camera.

11 But I still think it's premature at this
12 point. So I won't be ruling on it today, and it can be
13 raised again.

14 MR. VERA: Thank you, Your Honor.

15 MS. KIM: Your Honor, just one point of
16 clarification on Exhibits 578 and 773. I know that Your
17 Honor sustained defendant's objection on those exhibits
18 for Ms. Brandi, but, you know, you also instructed us to
19 meet and confer and maybe exchange documents, additional
20 backup documents we may have to show that, you know, Ms.
21 Brandi received and/or participated in the drafting of
22 these documents and had some background.

23 I just wanted to make sure that, you know,
24 if we can't make an agreement, it's something we can
25 raise if we decide to use these exhibits during our

1 direct of Ms. Brandi on Tuesday.

2 THE COURT: Well, I think meet and confer
3 first. But if you are -- if you can't reach an
4 agreement then the Court's ruling probably stands. But
5 certainly you can raise it with the Court that you've
6 met and conferred and you have something further that
7 you wish to place on the record in support of the
8 documents.

9 MS. KIM: Yeah, I think the only thing we'd
10 have further would be the additional documents that show
11 that Ms. Brandi had knowledge of these documents.

12 THE COURT: All right. So I think that a
13 meet and confer. Disclose to counsel these additional
14 documents. They may change their position on it. And
15 if they do, then you will raise that with the Court.

16 And if they don't, if you wish to address it
17 further then I would let you address it. But you can't
18 use them until the Court rules.

19 MS. KIM: Will do, Your Honor. Thank you.

20 THE COURT: All right. Anything further?

21 MR. FAY: I don't think so, Your Honor.

22 THE COURT: Time to go? Yes?

23 I'm sorry. So one of the law clerks who
24 isn't here, and this is important, so I'll ask you just
25 to be seated for a moment. This will be quick.

1 So there is a deposition that's been offered
2 with objections thereto. The subject came up earlier
3 today. Both sides have designated parts of the
4 deposition, and I don't know if both sides are
5 objecting. But just from experience in the past, what
6 would be most helpful to the Court is if the parties
7 provided the Court with a proposed order in Microsoft
8 Word format identifying the testimony that you want to
9 use; who is offering the testimony, whether it's
10 plaintiff or defendant; the objection thereto, and a
11 blank column for the Court's ruling.

12 So it's just to make it easier so when I get
13 ready to rule on it I have everything in one place and
14 then I can rule.

15 So if you could provide that to the Court.
16 I think neither side believes this will come up on
17 Tuesday, so we have time to do it. But you can start
18 working on it now.

19 So is it clear? Or do you want me to repeat
20 as to what I'm looking for?

21 MR. FAY: I think it's clear, Your Honor.

22 THE COURT: Okay.

23 MR. HUMMEL: Seems reasonably clear to me.
24 Hopefully, we'll be able to work those objections out.

25 THE COURT: All right. Hopefully, if not

1 then if you use that format it's just easier for all of
2 us.

3 All right. I think there's nothing -- yes?
4

5 MR. MILLER: I had mentioned to the Court
6 that I have a problem a week from Friday, the 24th. I
7 still have that conflict. The -- the -- what I would
8 ask maybe, with some indulgence from counsel here, is
9 certainly I need to be here for Kim Brandi's testimony,
10 but it looks like we'll have that done for certain
11 before Friday. I'm not too optimistic we'll be closing
12 on Friday. Those are two things that I think honestly
13 through reasons if nothing else to brag to my kids, I'd
14 like to be here when Mr. Aykroyd testifies.

15 If Friday were made of say of Gilberto
16 Sanchez's testimony and the experts -- which it may well
17 be -- I wouldn't need to ask for the Court to be dark.
18 I just hate to have us lose momentum. And I can send
19 somebody else, as long as not something that's crucial
20 to my involvement in the case. And really, those are
21 the only three things I consider crucial at this point.

22 THE COURT: Okay. It's not likely that
23 we're going to be dark on Friday. So it may be that
24 you've put me on notice that you have a conflict. So I
25 don't know how you want to resolve that.

1 So I think that you would see if you can
2 resolve it either with the other court, or someone else
3 could be here for you. But if it's important that you
4 be here for whatever is happening on Friday, the 24th, I
5 do not plan to be dark that day.

6 MR. MILLER: Thank you, Your Honor.

7 THE COURT: All right. Anything else?

8 MS. KIM: No, Your Honor.

9 THE COURT: Okay. We're in recess now. So
10 I'll see you tomorrow morning.

11 MS. KIM: Thank you, Your Honor.

12 MR. FAY: Thank you, Your Honor.

13 THE CLERK: Please rise. This Court is in
14 recess.

15 (PROCEEDINGS ADJOURNED.)

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CERTIFICATE OF REPORTER

COUNTY OF LOS ANGELES)
) SS.
STATE OF CALIFORNIA)

I, SHERI S. KLEEGER, OFFICIAL COURT REPORTER, IN AND FOR
THE UNITED STATES DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT
TO SECTION 753, TITLE 28, UNITED STATES CODE, THE
FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE
STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE
ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE
FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES.

DATE: MARCH 16, 2017

SHERI S. KLEEGER, CSR
FEDERAL OFFICIAL COURT REPORTER

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